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Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1986

ROSE SANDERS,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

ROSE SANDERS,

Petitioner,

VERSUS

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE, AND
ASSOCIATE JUSTICES OF THE SUPREME COURT
OF THE UNITED STATES:

ROSE SANDERS, the petitioner herein,
prays that a writ of certiorari issue to
review the judgment of the United States
Court of Appeals for the Ninth Circuit
entered in the above-entitled case on
February 26, 1987.



QUESTIONS PRESENTED

Whether a woman married to a tax protester who appeals an adverse decision of the United States Tax Court should be permitted to raise, argue and expound upon crucial constitutional challenges to Sections 66(c) and 6013 of the Internal Revenue Code of 1954, as amended, as well as to her prosecution for failure to report community property income known only to her tax-dodging husband, after she initially failed to do more than merely raise the issues of "fairness" and "due process" in an opening appellate brief but shortly thereafter was prepared and ready to file a detailed full-length supplemental brief on the constitutional issues before any oral argument on any issues was had; and



OPINIONS BELOW

The February 26, 1987 Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is printed in the separate Appendix A to this Petition at page A-1. A copy of the January 22, 1986 Memorandum and Opinion of the United States Tax Court is also printed in Appendix A, at page A-13. The Order of September 25, 1986, by Circuit Judge Barnes, is printed in Appendix A, at page A-23.

JURISDICTION

The Memorandum Opinion of the Court of Appeals (Appendix A, page A-1) was filed on February 26, 1987.

The jurisdiction of this court is thus invoked pursuant to 28 USC 1254(1).



Whether the Sections 66 and 6013 of the Internal Revenue Code, construed together and applied to this Petitioner, are unconstitutional as a deprivation of due process and equal protection.

**CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED**

This case involves Section 66(c) of the Internal Revenue Code of 1954, as amended, which provides as follows:

(c) Spouse Relieved of Liability in Certain Other Cases....

Under regulations prescribed by the Secretary, if ...

(1) an individual does not file a joint return for any taxable year.

(2) such individual does not include in gross income for such taxable year an item of community income properly



includable therein which, in accordance with the rules contained in Section 879(a), would be treated as the income of the other spouse.

(3) the individual establishes that he or she did not know of, and had no reason to know of, such item of community income, and

(4) taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual's gross income, then, for the purposes of this title, such item of community income shall be included in the gross income of the other spouse (and not in the gross income of the individual).

The case also involves Section 6013(e) of the Internal Revenue Code of 1954, as amended, which provides as follows:

(e) Spouse relieved of liability in certain cases ...

(1) In general Under regulations prescribed by the Secretary if --

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25% of the amount of gross income stated in the return.

(B) the other spouse establishes that in signing the return that he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefited directly or indirectly from the items omitted from gross income and taking into account all other facts

and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year, attributable to such omission, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.

The case also involves the latter part of Amendment V to the United States Constitution, which provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.



-11-
STATEMENT OF THE CASE

In Petitioner's opening appellate brief, filed July 19, 1986 (Appendix B, Page 1) she sought to challenge the constitutionality of Section 6013(e) by arguing that as a matter of "equity, fairness and due process," she should have been treated as an "innocent spouse" under the Code. Indeed, the opening brief further dwelled on the remedial intent of the innocent spouse provision, citing constitutional law.

The Petitioner thereafter filed a Motion on August 22, 1986, seeking leave to file a supplemental brief expounding upon the constitutional challenges. The motion was denied by the Order of September 25, 1986 (Appendix A, page 23).

Petitioner consequently filed a Motion for Reconsideration of the Petition for Leave to File a Supplemental

Appellant's Brief (Appendix B, page 54). In that Motion, Petitioner claimed that the supplemental brief should be accepted and considered by the Court of Appeals because an unsubstantial amount of time had elapsed between the filing of the original brief and the proposed filing of the supplemental brief. Moreover, Petitioner argued that there would be no prejudice to the government since it would be permitted to file a supplemental answer, if necessary, and no oral argument had yet occurred.

Petitioner's Motion for Reconsideration specifically indicated that the supplemental brief presented arguments based upon the equal protection and due process guarantees of the Constitution. The Motion indicated that the brief focused on the "effects of the Internal



The Rose Sanders Predicament

Rose Sanders, the taxpayer and petitioner herein agreed with her husband to treat their income and earnings separately in 1980 and 1981 even though they lived in the community property state of Arizona at the time. As such, Mrs. Sanders filed a separate individual income tax return, rather than the more typical joint marital return.

At the same time, and continuing since then, Mr. Sanders became an active and unrelenting tax protester, committed to enshrouding and ensconcing his earnings from his wife and from the Internal Revenue Service.

Thus, when Mrs. Sanders filed her tax returns in 1980 and 1981, she was unable to ascertain what additional income her elusive husband might have

earned. That notwithstanding, the IRS penalized her for failing to report the income.

The Legal Predicament

Petitioner Rose Sanders has asked the United States Court of Appeals to regard her as an "innocent spouse" -- a term of art commonly used in tax parlance to refer to a married individual who did not know, nor could have known, of his or her spouse's illegal conduct.

Section 6013(e) of the Internal Revenue Code, 26 USC 6013(e), confers innocent spouse status upon only those taxpayers who file joint returns.

Because this Petitioner filed her tax return separately and not jointly, the government has argued that she is not entitled to innocent spouse status.

In Petitioner's opening appellate brief, filed July 19, 1986 (Appendix B, Page 1) she sought to challenge the constitutionality of Section 6013(e) by arguing that as a matter of "equity, fairness and due process," she should have been treated as an "innocent spouse" under the Code. Indeed, the opening brief further dwelled on the remedial intent of the innocent spouse provision, citing constitutional law.

The Petitioner thereafter filed a Motion on August 22, 1986, seeking leave to file a supplemental brief expounding upon the constitutional challenges. The motion was denied by the Order of September 25, 1986 (Appendix A, page A-23).

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Petitioner's Motion for Reconsideration specifically indicated that the supplemental brief presented arguments based upon the equal protection and due process guarantees of the Constitution. The Motion indicated that the brief focused on the "effects of the Internal



Revenue Code on married women," and, as such, it presented "a vital public question of paramount judicial, legal and sociological importance."

However, the Petitioner's arguments for reconsideration were summarily rejected by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD BE GRANTED TO RESOLVE
AN IMPORTANT QUESTION OF FEDERAL LAW
WHICH HAS NOT BEEN, BUT SHOULD BE,
SETTLED BY THE SUPREME COURT

The issue in this case is not sheerly the procedural matter of whether the Petitioner's supplemental brief should have been permitted as part of her appeal to the United States Court of Appeals. Whatever the tax procedural rule is, this taxpayer's appeal involves a woman who has been penalized by the Internal Revenue Service for choosing to remain married to a tax protester while having no part in his protest.

This is the first case in which a married woman has attacked a provision of the Internal Revenue Code which was purportedly adopted to protect married

women, but which fails to protect those who choose to file separate tax returns -- another right afforded in the Code.

By not allowing Petitioner to properly develop this constitutional argument on appeal, the Court of Appeals has fractured and devitalized the Petitioner's fundamental right to appeal. Such an approach runs counter to Rule 28(j) of the Federal Rules of Appellate Procedure, which provides for supplementing briefs with pertinent authorities.

Yet certainly more urgent than the rules of procedure is the limited context in which Petitioner was ultimately forced to present her appeal. Indeed, the Court of Appeals proceeded to consider this case without the benefit of any constitutional arguments.



Petitioner first seeks to argue that she has been deprived of her constitutional property rights under the due process clause because the strict construction of Sections 66(c) and 6013(e) of the Internal Revenue Code, dealing with "innocent spouse" status, deprive her of that status because she merely chose to file her tax returns separately. In fact, Petitioner lacked the requisite knowledge and responsibility for her husband's undisclosed income. Her husband was and is a tax protester exercising his freedom of expression in defiance of the Internal Revenue Code. But the Petitioner has neither acquiesced to her husband's protest nor profited therefrom. Yet because the tax code makes distinctions in filing status, this innocent spouse is unable to qualify as a technical innocent spouse under the Code.

Such due process violations cannot be tolerated, even if committed by the IRS in what appears to be a proper enforcement activity. Todd v. United States, 85-2 USTC par. 9560 (1985).

Moreover, Petitioner has sought to argue that the enforcement of Section 6013(e) violates the equal protection guarantee in that it creates an uneven treatment of different classes of married tax filers. Such classifications have previously been outlawed. See, e.g., Taxation with Representation of Washington v. Regan, et al., 676 F.2d 715, 49 AFTR 2d 82-961 (1982).

In this Petitioner's case, she has had to choose between remaining married to a tax protester whose political views she did not share (and thereby enduring the risks of living in a community property state), or getting divorced and



escaping liability for her husband's subsequent tax evasion.

To wit, the matter on appeal raises urgent questions of public and private importance, touching the very heart of the institution of marriage and challenging the current method of apportioning the tax burden among married individuals based upon filing status. The Court of Appeals is obligated to balance the considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decision-making. Consumers Union of United States Inc. v. Federal Power Commission, 510 F.2d 656 (1974).

II

A WRIT OF CERTIORARI SHOULD BE GRANTED
TO FORCE A CONSISTENT TREATMENT AMONG
COURTS OF APPEAL ADDRESSING
THE EQUITABILITY ISSUE

Section 6013(e) of the Code contemplates whether or not the proposed innocent spouse significantly benefits from the tax-evading spouse's conduct, Schmidt v. United States, 84-1 USTC par. 9333 (1984); Treas. Reg. 1.6013-5.

In the case sub judice, the Opinion of Judge Mary Cohen of the United States Tax Court (Appendix A, page 13) suggests that this Petitioner did profit from her husband's failure to report income.

The only known countervailing argument is that of equitability; viz, the appellate courts have asserted that even where a District Court found that a spouse significantly benefitted, innocent

spouse relief would nevertheless be available if it would be inequitable to hold the wife liable for the unpaid taxes. This has been the ruling of the Fifth Circuit, Sanders v. United States, 509 F.2d 162, 170, 171, n.6 (5th Cir. 1975), the Seventh Circuit, Busse v. United States, 76-2 USTC par. 9676 (7th Cir. 1976), and the Tenth Circuit, Dakil v. United States, 496 F.2d 431, 433 (10th Cir. 1974).

In the instant case, the Petitioner is being precluded from making her equitability claim. By refusing to accept the Supplemental Brief, the Ninth Circuit Court of Appeals refused to entertain the equitability argument. In taking such a stand, the Ninth Circuit excluded a measure of relief which has already been adopted and asserted by the Fifth, Seventh and Tenth Circuits. -



Therefore, certiorari must intervene to compel the Ninth Circuit to allow an argument which follows the uniform thinking of the other Circuits. In the words of the Tenth Circuit, "[e]ven a tax collector should have some heart." Dakil, supra, 496 F.2d at 433. But without intervention, the equitability argument will not be considered.

III

THE SUPREME COURT'S POWER OF SUPERVISION SHOULD BE EXERCISED TO ALLOW THE FAR-REACHING CONSTITUTIONAL ISSUES IN THIS APPEAL TO BE BRIEFED AND ARGUED BEFORE A DECISION IS RENDERED

The Petitioner's case is not an isolated predicament. In this age of innovative and liberalized family living arrangements, it is not at all uncommon to find married couples filing separate tax returns.

Likewise, it is not at all uncommon in this era of tax reform to find protesters who challenge the old amended code, the newly amended code, or both. The incidence of tax evasion has certainly not dwindled in recent years.

Hence, the erroneous and potentially harmful effects of Section 6013(e) -- a statute which does not protect innocent spouses filing separate returns -- present a far-reaching constitutional dilemma for law-abiding married taxpayers.

The Court of Appeals hastily denied a motion for leave to file a supplemental brief only 32 days after the original brief was filed. The original brief raised the constitutional issue of due process in its Statement of Questions Involved. It referred to the constitutional issues superficially throughout the argument and was concededly weak as to the constitutional issues. However, the opening brief certainly raised the issues. This Petitioner subsequently discovered and developed a stronger, more detailed, constitutional argument and properly sought to supplement the original brief. The government objected, and the Court of Appeals denied the Motion for Leave.

Petitioner has argued to the Court of Appeals that the constitutional issues are of far-reaching importance, and that

she initially addressed the issue and should not therefore be barred from supplementing it with additional authorities and sub-arguments. Petitioner has further argued that it was vital for her to seek a rehearing on her motion for leave since if she failed to bolster her appeal with the appropriate constitutional arguments, the appellate courts would be under no burden to remedy the defect. Carducci v. Regan, 714 F.2d 171 (1983).

Petitioner believes that her predicament is a tangible and overriding constitutional inequity and that, irrespective of any procedural considerations governing the presentation of appellate briefs, she should be permitted to raise, develop and ultimately argue the constitutional objections to this extraordinary prosecution under the tax code. Because of the nature of the questions presented,



it is imperative that a writ of certiorari be granted to the United States Court of Appeals for the Ninth Circuit.

The final word as to the tax liability of Rose Sanders should, of necessity, be influenced by the constitutional arguments which Petitioner was prepared to present. The immediacy of this issue is obvious and of imperative public importance.

CONCLUSION

WHEREFORE, Petitioner respectfully
prays that a writ of certiorari be
granted.

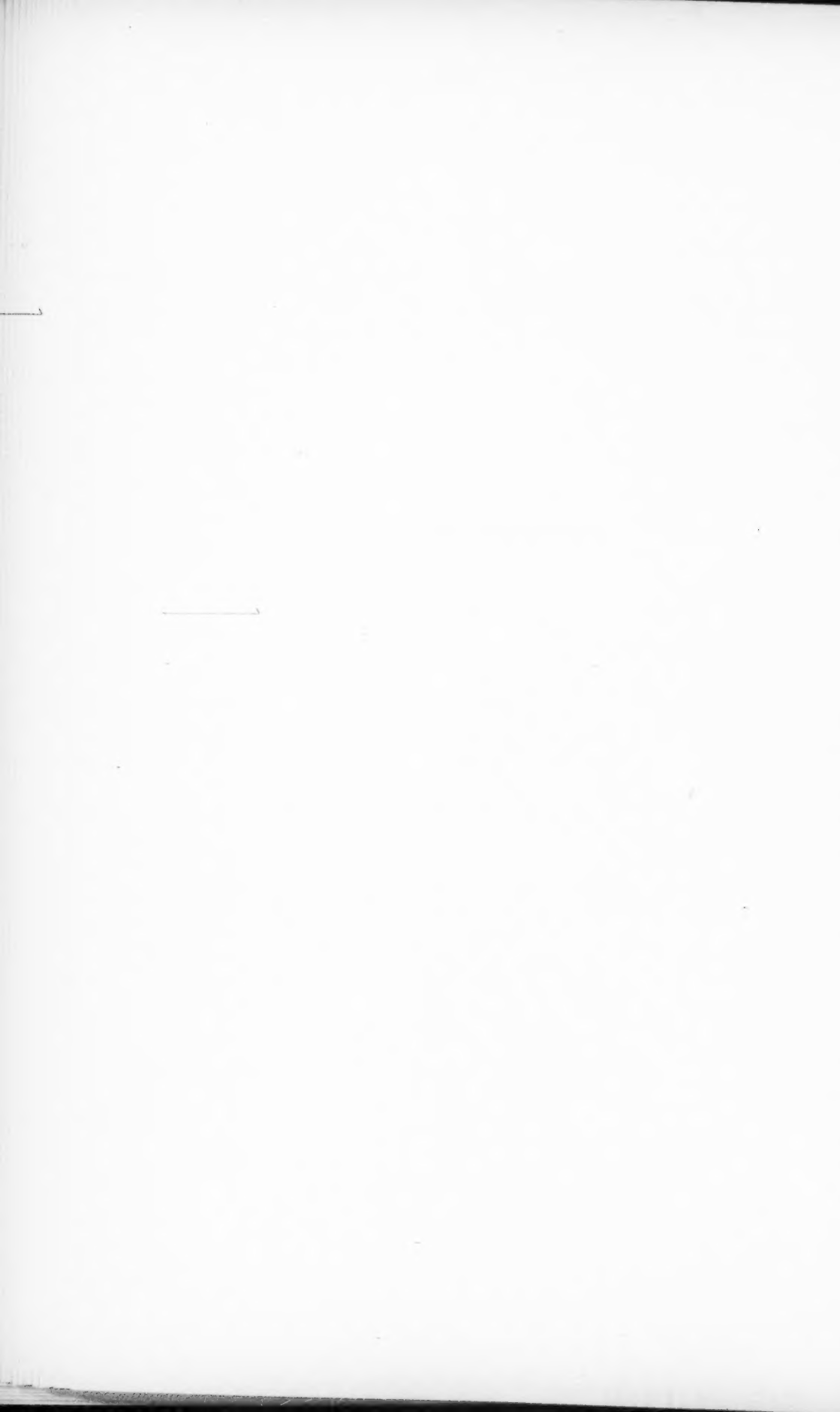
DATED: June 20, 1987

Respectfully submitted,

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APPENDIX "A"



NOT FOR PUBLICATION

NO. 86-7236
Tax Ct. No. 27352-83

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSE SANDERS

Petitioner-Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent-Appellee.

M E M O R A N D U M *

On Appeal from a Decision of the
Tax Court of the United States

Argued and Submitted - February 2, 1987
Pasadena, California

Before: SNEED, FARRIS and NOONAN
Circuit Judges

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R.21.



Rose Sanders appeals the decision of the Tax Court upholding the deficiencies determined by the I.R.S. for her 1980 and 1981 tax returns. She contends that she and her husband agreed to treat their earnings as separate property outside the community property regime of Arizona, thus relieving her of tax liability for half of his earnings on her separate return. Alternatively, she claims the protection of "innocent spouse" provision of the Code.

FACTUAL BACKGROUND

According to their testimony, Rose and Darrel Sanders agreed before marriage to keep their income separate, while pooling a set amount each month for joint expenses. They each deposited \$800 per month into a joint bank account. Mr. Sanders drew \$450 or \$500 each month to

pay child support to his ex-wife, and \$100 to pay down a credit card. Mrs. Sanders drew on the account for the mortgage payment (\$500), the groceries (\$300), and utilities (\$200).

Mr. Sanders, a tax protester, did not tell Mrs. Sanders how much he earned, keeping his records in a personal file at home. She did know that he was earning money. (Excerpt at 38) The IRS later determined from employment records that he earned \$32,256 in 1980 and \$39,514 in 1981, while Mrs. Sanders earned \$15,445 and \$15,245 in those years.

In 1980 and 1981 she filed a separate tax return, reporting her earnings alone. After consulting with the IRS and with state officials in early 1982, she noted on her 1981 return that she was

unable to report Community Property Income. t/p is reporting only her income and related expenses -- t/p

has no knowledge of Husband's income
-- SS. etc.

The IRS assessed deficiencies of \$3,283.57 for 1980 and \$4,933.00 for 1981 because Mrs. Sanders failed to report her half of the community income, plus additions to tax of \$274.08 for intentional or negligent disregard of the tax laws (Code § 6653(a)) and \$472.07 for failure to pay estimated tax (Code § 6654(a)).

The Tax Court generally sustained the IRS assessments, deeming the "alleged agreement" to treat their earnings as separate property "an afterthought for purposes of this case." Mrs. Sanders' mention of "Community Property Income" on her return, the Tax Court observed, contradicted her current claim that the earnings were separate property by agreement. Because of her bona fide effort to comply, however, the Tax Court struck down the § 6653(a) addition to tax. The

2

Tax Court denied Mrs. Sanders the protection for "innocent spouses" under § 66(c), though, because she knew that Mr. Sanders was earning income.

ANALYSIS

A. Standard of Review

A decision of the Tax Court is reviewed in the same manner as a civil bench trial in District Court. 26 U.S.C. § 7482(a); Mayors v. C.I.R., 785 F.2d 757 (9th Cir. 1986). Concerning whether the Sanders agreed to make their earnings separate property, this court applies the clearly erroneous standard, because it is an essentially factual inquiry. See United States v. McConney, 728 F.2d 1195, 1203 (9th Cir. 1984), cert. den., 105 S.Ct. 101 (1985).

B. Agreement to Treat
Earnings as Separate

Under Arizona law, Mrs. Sanders has to rebut by clear and convincing evidence the presumption that income during the marriage is community property. Ariz. Rev. Stat. § 25-211; Evans v. Evans, 79 Ariz. 284, 288 P.2d 775 (1955); Edward v. C.I.R., 680 F.2d 1268, 1271 (9th Cir. 1982); Tax Court Rule 142(a). Absent such a showing, she is subject to the general rule that each spouse is taxable on half of the community income. Goodell v. Koch, 282 U.S. 101, 121 (1930).

The Sanders' testimony claiming an agreement to treat income as separate property is undercut by the commingling of funds in their joint account. In two other cases where oral agreements to keep property separate were upheld, each spouse maintained separate accounts. Naegle v.

count that could dispel the inference that the pooled income was not truly separate. Porter v. Porter, 67 Ariz. 273, 195 P.2d 132 (1948).

Further evidence weighing against the claimed agreement is the note by Mrs. Sanders on her 1981 return that she was unable to report "Community Property Income." She apparently made this statement upon some reflection and after consulting with state and IRS officials. Had she said "husband's income is separate," or words to that effect, that would support her current contention. Entirely inconsistent with that contention is the natural reading of what she actually wrote: "I know I am supposed to report half of my husband's income as community property income, but I am reporting only my own because I don't know what his income is." Read in that manner, the

C.I.R., 24 T.C.M. (CCH) 1099, 1102 (1965), aff'd, 378 F.2d 397 (9th Cir. 1967), cert den., 390 U.S. 927 (1968); Shoenhair v. C.I.R., 45 B.T.A. 576 (1941). The cases cited by Mrs. Sanders concerning commingling of funds are inapposite because they involve funds that were from an indisputably separate source, such as a trust fund. Noble v. Noble, 26 Ariz.App. 89, 546 P.2d 358 (1976); Bowart v. Bowart, 128 Ariz. 331, 625 P.2d 920 (Ct. App. 1980). At issue here is not whether commingling transmutes unquestionably separate property into community property, but rather what light the commingling sheds upon the claim of an agreement to make the earnings separate property. Moreover, the rough estimates of monthly spending do not permit the elaborate tracing of each spouse's "separate" income through the joint ac-

note is scarcely just a confusing discrepancy as Mrs. Sanders contends. The present case is distinguishable from Aronow v. C.I.R., 29 T.C.M. (CCH) 1079 (1970), cited by Mrs. Sanders, where the Tax Court upheld an oral agreement to divide up community property despite a boilerplate integration clause in a later written agreement confirming that settlement.

The trial court's determination, that Mrs. Sanders had failed to show by clear and convincing evidence that she and her husband agreed to keep their incomes separate, was not clearly erroneous.

C. Innocent Spouse Protection of Section 66

Section 66(c) of the Code relieves from liability a spouse who omits from his or her separate return an item of community income attributable to the



other spouse, on two conditions: if "(3) the individual establishes that he or she did not know of, and had no reason to know of, such item of community income, and (4) taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual's gross income...." I.R.C. § 66(c)(3), (c)(4).

As the Tax Court rules, Mrs. Sanders plainly failed the first condition. "I did know what he was earning, but I filed separately because I didn't like what he did. I -- I didn't want any part of it, so I filed separately." (Excerpt at 38.) Knowledge of the exact amount of his earnings is not required under the Statute; it suffices that she knew of his earnings, which were an item of community income under the analysis of the preceding section.

Moreover, it is unlikely that Mrs. Sanders could satisfy the second condition. She was in an awkward situation, it cannot be doubted, but equity does not favor turning a blind eye to such a predicament.

D. Applicability of Section 6013

Similar protection for innocent spouses filing joint returns is provided by § 6013, which authorizes joint returns in general. Mrs. Sanders invokes I.R.C. § 6013(e), which however not only contains the same "did not know, and had no reason to know" condition of § 66(c)(3) discussed above, § 6013(e)(1)(C), but also requires that "a joint return has been made under this section for a taxable year...." § 6013(e)(1)(A). The separate returns filed by Mrs. Sanders disqualify her from the protection of this section. See Chapman v. C.I.R., 45

T.C.M. (CCH) 238, 239 (1982) (Cohen, J.).

The decision of the Tax Court is
AFFIRMED.

T. C. MEMO. 1986-26

UNITED STATES TAX COURT

ROSE SANDERS, Petitioner

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Docket No. 27352-83

•Filed January 22, 1986

JOYCE REBHUN, for the Petitioner

HOWARD ROSENBLATT, for the Respondent



MEMORANDUM FINDINGS OF
FACT AND OPINION

COHEN, Judge: Respondent determined deficiencies and additions to tax as follows:

<u>Year</u>	<u>Deficiency</u>	<u>Additions to Tax</u>	
		<u>Sec. 6653(a)^{1/}</u>	<u>Sec. 6654(a)</u>
1980	\$3,283.57	\$ 27.43	--
1987	4,933.00	246.65	\$472.07

The deficiencies resulted from Respondent's determination that Petitioner had failed to report community income attributable to her husband, a tax protester who failed to file returns for the years in issue. Petitioner contends that she and her then husband had agreed that such earnings would be separate property.

1/

Unless otherwise indicated, all statutory references are to the Internal Revenue Code of 1954, as amended, and in effect during the years in issue.

FINDINGS OF FACT

Petitioner was a resident of Phoenix Arizona, at the time she filed her Petition herein. She timely filed individual income tax returns for 1980 and 1981, reporting her earnings and indicating a filing status of married filing separate return.

During 1980 and 1981, Petitioner was married to Darrel Sanders (Sanders), and she and Sanders resided in Arizona. Petitioner earned \$15,445 in 1980 and \$15,245 in 1981. Sanders earned \$32,256 during 1980 and \$39,514 in 1981. Neither Petitioner nor Sanders reported his earnings on any tax return.

During the years in issue, Petitioner and Sanders maintained a joint bank account into which they deposited some or all of their earnings and out of



which they paid community expenses and obligations owed by Sanders to his former wife. Sanders did not otherwise advise Petitioner of the amount of his earnings during the years in issue. Petitioner knew that Sanders was employed and that he was not filing tax returns, but Petitioner did not know the amount of Sanders earnings.

At the time she filed her tax returns for 1980 and 1981, Petitioner sought advice from her preparer, from the Internal Revenue Service, and from the State of Arizona as to the proper means of filing her tax return. She was advised to write a note on her tax return disclosing the situation. On her Federal income tax return for 1981, Petitioner included a note as follows:

t/p unable to report Community Property Income. t/p is reporting only her income and related expenses

... t/p has no knowledge of Husband's income ... S.S., etc.

3-5-82 [signed] Rosemary Sanders

Respondent determined that one-half of Petitioner's earnings reported on her returns was attributable to Sanders and that one-half of Sanders' earnings was attributable to Petitioner during the years in issue.

OPINION

This case illustrates the unfortunate and unintended consequences of the folly of tax protest. Although Petitioner attempted to comply with her tax obligations, her marriage to a protester and their residence in a community property state have subjected her to the consequences of his noncompliance. Because no joint returns were filed for the

years in issue, Petitioner is denied the potential benefits of joint return rates. See sections 1(a) and (d). At the same time, because Petitioner knew of Sanders' receipt of income from his employment, she does not qualify for relief as an "innocent spouse." Section 66(c)(3).

The principles applicable to this case were stated in Beall v. Commissioner 82 T.C. 70, 71-73 (1984), as follows:

Arizona law provides that the earnings of either spouse are community property, and each spouse has an equal one-half interest in those earnings. Ariz.Rev. Stat. Ann. sec. 25-211 (West 1976); Goodell v. Koch, the earnings of his or her spouse to the extent that he or she has a vested ownership interest in the spouse's earnings. United States v. Mitchell, 403 U.S. 190, 196-197 (1971); Edwards v. Commissioner, 680 F.2d 1268 (9th Cir. 1982), affg. an unreported decision of this Court.

Arizona law permits spouses to enter into an agreement whereby subsequent earnings of either spouse will remain the separate property of the spouse earning the income, and such agreement, if valid under

Arizona law will be recognized for tax purposes. Shoenair v. Commissioner, 45 B.T.A 576 (1941); Naegle v. Commissioner, T.C. Memo. 1965-212, affd. on another issue 378 F.2d 397 (9th Cir. 1967). The burden of proving such a valid agreement, however, is on petitioner. Rule 142(a), Tax Court Rules of Practice and Procedure.

* * *

The law requiring petitioner to report as income her share of her husband's earnings is well established and applied even where the result seems inequitable. See United States v. Mitchell, *supra*; Brent v. Commissioner, 630 F.2d 356 (5th Cir. 1980); Bagur v. Commissioner, 630 F.2d 491 (5th Cir. 1979)....

Petitioner contends that the arrangements between her and Sanders during the years in issue constituted an agreement to transmute their earnings into separate property. This contention, however, is inconsistent with the contemporaneous statement contained on Petitioner's 1981 tax return. Her prior good faith efforts to report his income

as community income on her returns unfortunately undermine her present contention that they had agreed prior to their marriage that such income was not community property. In any event, her present argument is supported by the evidence.

Petitioner and Sanders testified that each of them contributed \$800 per month to the joint bank account, which was used to pay community expenses and separate obligations of Sanders.^{2/} Both had been married before and approached the second marriage with caution. Each testified that Sanders did not pay income taxes and that he refused to provide

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It is ironic that her earnings, which were less than half of his, contributed more toward support of the community. Under these circumstances, it is doubtful that a Court would determine that his earnings were separate property to which she had no claim.

information to Petitioner with respect to his earnings. Neither, however, provided any specifics of an alleged premarital agreement that the earnings would be separate property. It appears that such alleged agreement is an afterthought for purposes of this case.

Petitioner has failed to carry on her burden of proving that the earnings were not community property. See Beall v. Commissioner, supra; Kroloff v. United States, 487 F.2d 334, 336 (9th Cir. 1973); Barr v. Petzhold, 77 Ariz. 399, 273 P.2d 161 (1954); Porter v. Porter, 67 Ariz, 273, 279, 195 P.2d 132, 136 (1948).

Petitioner made a bona fide attempt to comply with her obligation to report her share of her husband's earnings. Under the circumstances of this case we conclude that her failure to report her share of those earnings was not due to



negligence or intentional disregard of rules and regulations. The additions to tax under section 6653(a) are not sustained.

The addition to tax under section 6654(a) for failure to pay estimated tax, however, is mandatory absent exceptions not here applicable. *Grosshandler v. Commissioner*, 75 T.C. 1, 21 (1980).

Decision will be entered for the respondent for the amounts of the deficiencies and addition to tax under section 6654(a) only.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 86-7236

ROSE SANDERS,

Petitioner,

versus

TAX COURT, INTERNAL REVENUE SERVICE,

Respondent.

ORDER

Before: BARNES, Circuit Judge

Petitioner's motion of August 22, 1986, for leave to file a supplemental opening brief is denied. Petitioner has not justified her failure to include the material she seeks to add in her original opening brief. The supplemental opening brief shall be returned to Petitioner.

APPENDIX "B"

In the
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 86-7236

ROSE SANDERS,

Appellant,

versus

COMMISSIONER OF INTERNAL REVENUE,

Appellee.

APPEAL FROM ORDER OF THE UNITED STATES
TAX COURT, FINDING FOR RESPONDING-
APPELLEE AND HOLDING VALID TAX
DEFICIENCIES AND ADDITIONS.

BRIEF FOR APPELLANT

JOYCE REBHUN
Attorney for Appellant
5344 Fairview Boulevard
Los Angeles, CA 90056



CERTIFICATION AS TO INTERESTED PARTIES

ROSE SANDERS

NO. 86 - 7236

Certification Required by the Ninth
Circuit Court of Appeals Rules 13(b)(3)

The undersigned, counsel of record
for Rose Sanders, certifies that there
are no interested parties in the outcome
of this case.

Joyce Rebhun

Attorney of Record for: ROSE SANDERS



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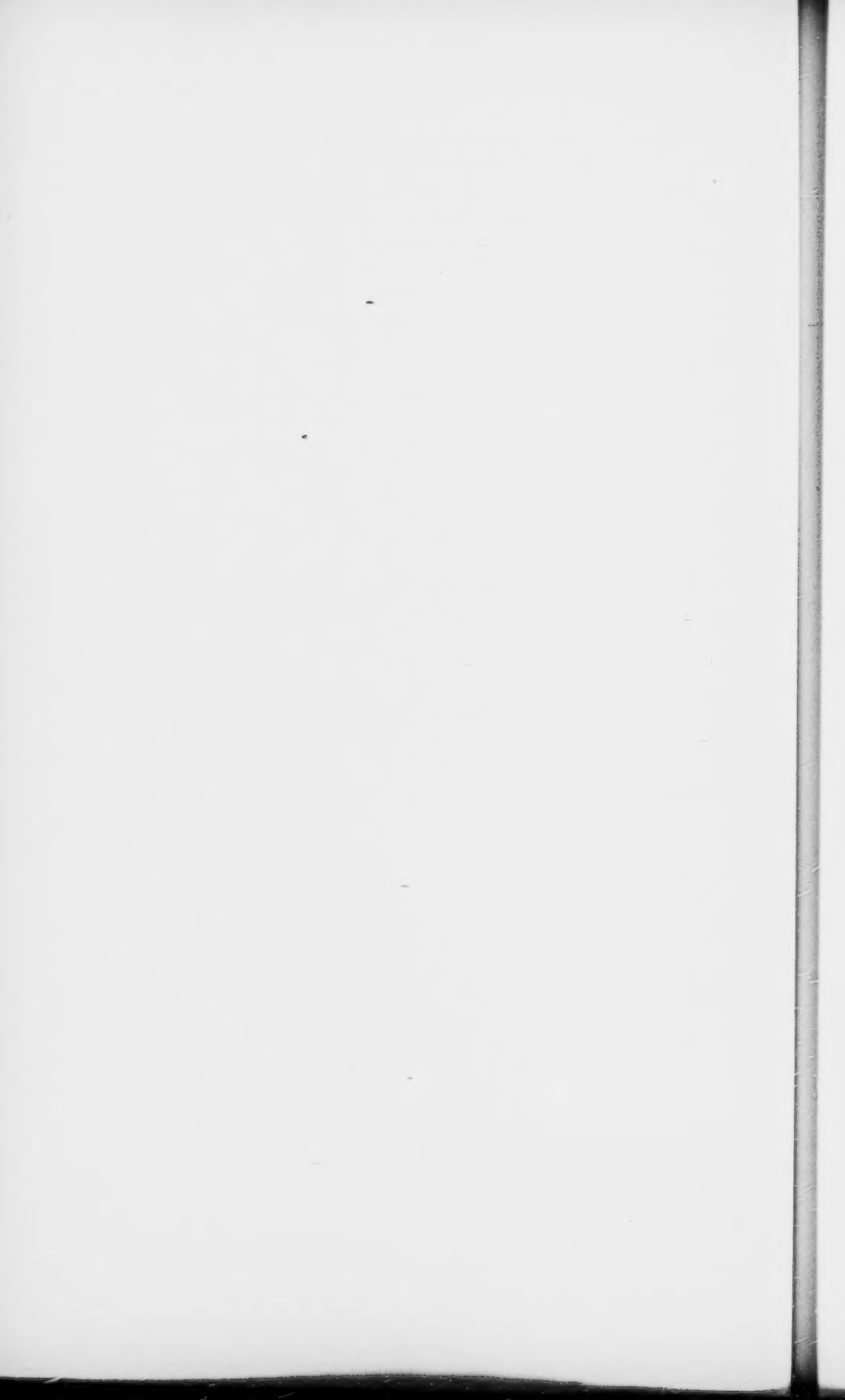
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STATEMENT OF THE QUESTIONS INVOLVED

I. Whether, as a matter of law, a former Arizona woman's oral agreement with her husband to treat their individual earnings as separate property was sufficient to avoid tax liability for one-half of her husband's income in a community property state, despite a joint bank account and a misleading note written to the Internal Revenue Service.

II. Whether, as a matter of equity, fairness and due process, a wife-taxpayer ought to be treated as an "innocent spouse" under Section 6013(e) of the Internal Revenue Code of 1954, as amended, or otherwise insulated from liability, where her spouse independently refuses to pay taxes, report his earnings



or identify his job and financial position to her and where the wife earnestly attempts to report income as a married individual filing a separate tax return.

STATEMENT OF THE CASE

This matter is before the Court on appeal from an Order of the United States Tax Court, No. 27352-83, wherein tax deficiencies and additions to tax under Internal Revenue Code Section 6654(a) were held to be valid against Petitioner-Appellant Rose Sanders. The Order of the Tax Court was entered on January 29, 1986, and this appeal was timely filed on April 21, 1986, pursuant to 26 U.S.C. 7483. Power to review this decision is vested in this Court by virtue of 26 U.S.C. 7481-7487.

Briefly, this case revolves around the ill-fated attempts of a former Arizona woman to comply with federal income tax laws when her husband would not do so.

The years in question are 1980 and 1981. During those two tax years, Appellant Rose Sanders timely filed individual income tax returns, reporting her earnings and indicating a filing status of married filing separate returns. Mrs. Sanders was unable to report community property because her husband, an avid tax protester, would not reveal either his job or his revenue to her or to the Internal Revenue Service. Moreover, Mrs. Sanders and her husband had agreed to treat their earnings as separate property, and at least for financial and taxation purposes, had conceded that their marital status was essentially a nullity.



The couple maintained a joint bank account for the convenience of paying regular household bills. (Tr. 9, see also Opinion, Cohen, J. at A-20). However, there was a decided splitting of the bills: Mrs. Sanders individually paid the rent, telephone bill, electricity bill and grocery bill from the account. (Tr. 9)

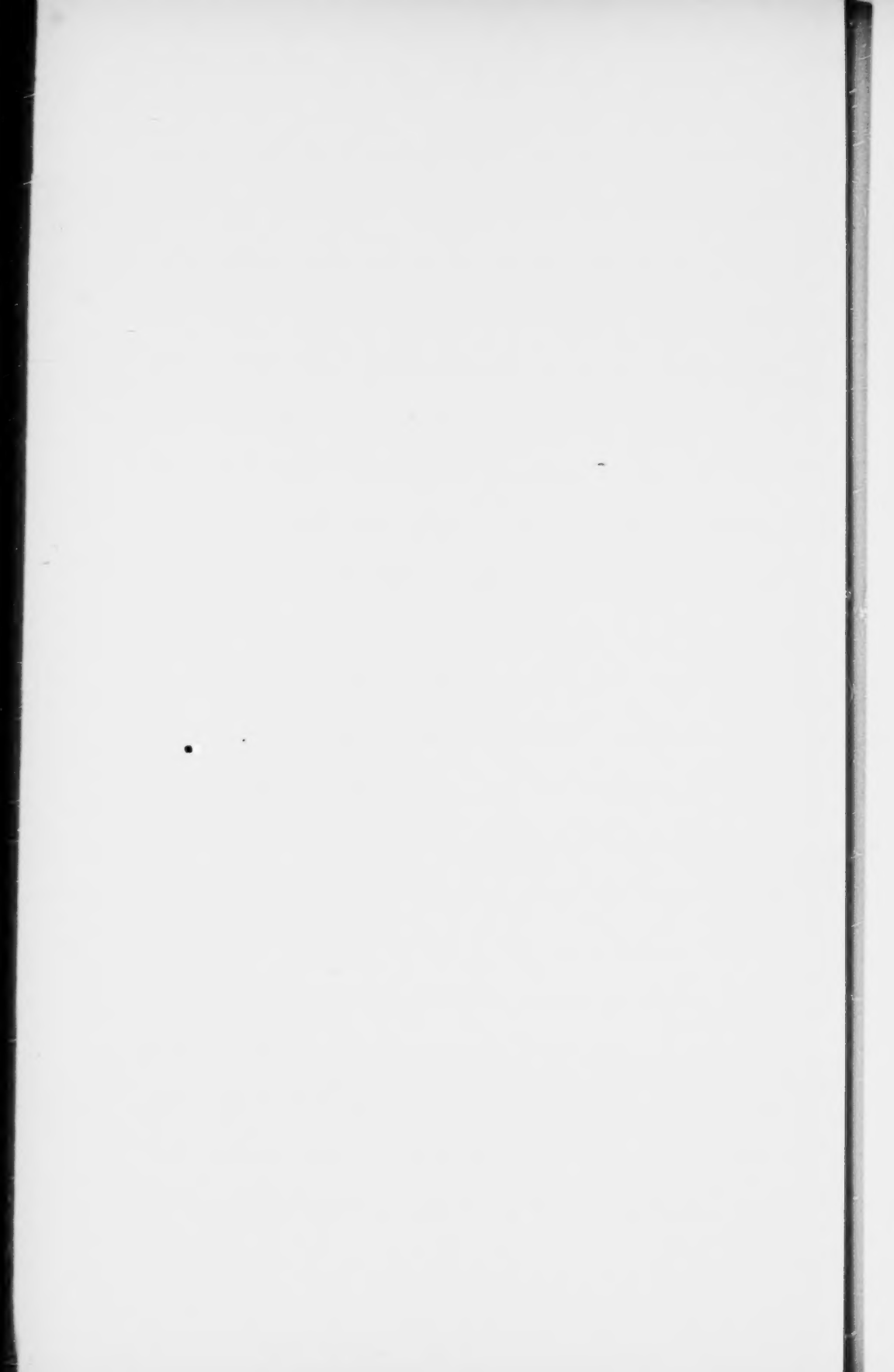
The reality of the marriage is that Mrs. Sanders neither relied on her husband for support nor needed to rely on him. Indeed, her family had supported her financially in the past (Tr. 12), and having been successful in her own career, she strived to be "independent and self-sufficient." (Tr. 12.)

It was thus with considerable restraint, concern and confusion that she asked her tax preparer, the IRS and the State of Arizona how to prepare her tax

returns to avoid penalties for her husband's noncompliance with the law. (Tr. 11); Opinion at A-16)). On her federal income tax return for 1981, Mrs. Sanders included a note indicating that she was unable to report community property income, that she was reporting only her own income and, in fact, had not knowledge of her husband's income. (Opinion at A-16, Pet. Ex. 3.)

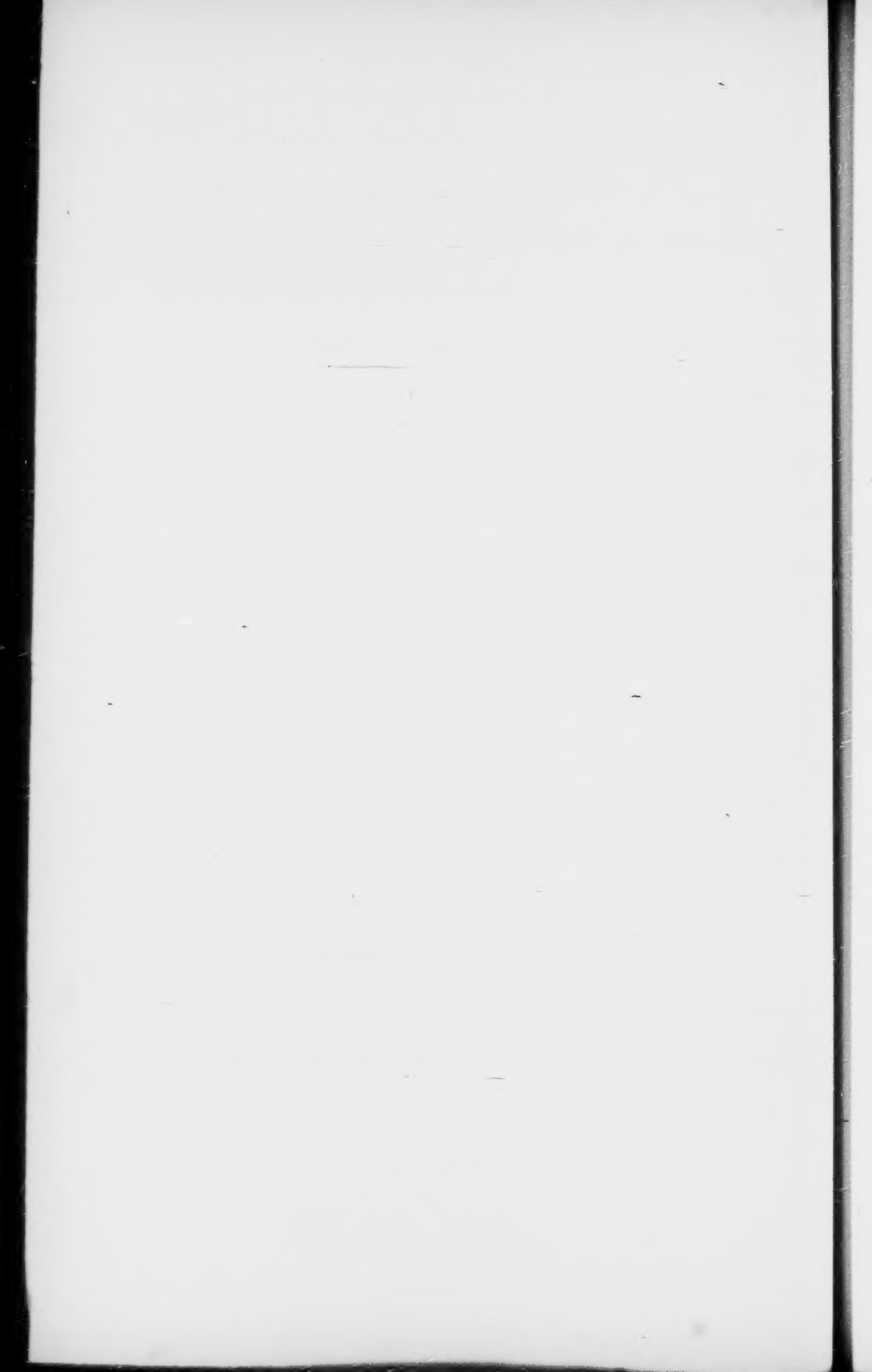
The United States Tax Court construed Mrs. Sanders' earnest attempts to comply with the law, and her note to the IRS, as an admission that she intended to be bound by Arizona's community property laws. (Opinion at A-20.)

Although she had testified that she sought to be treated as an individual and did not want anyone to take care of her (Tr. 12), and her husband testified that he maintained a private personal file of

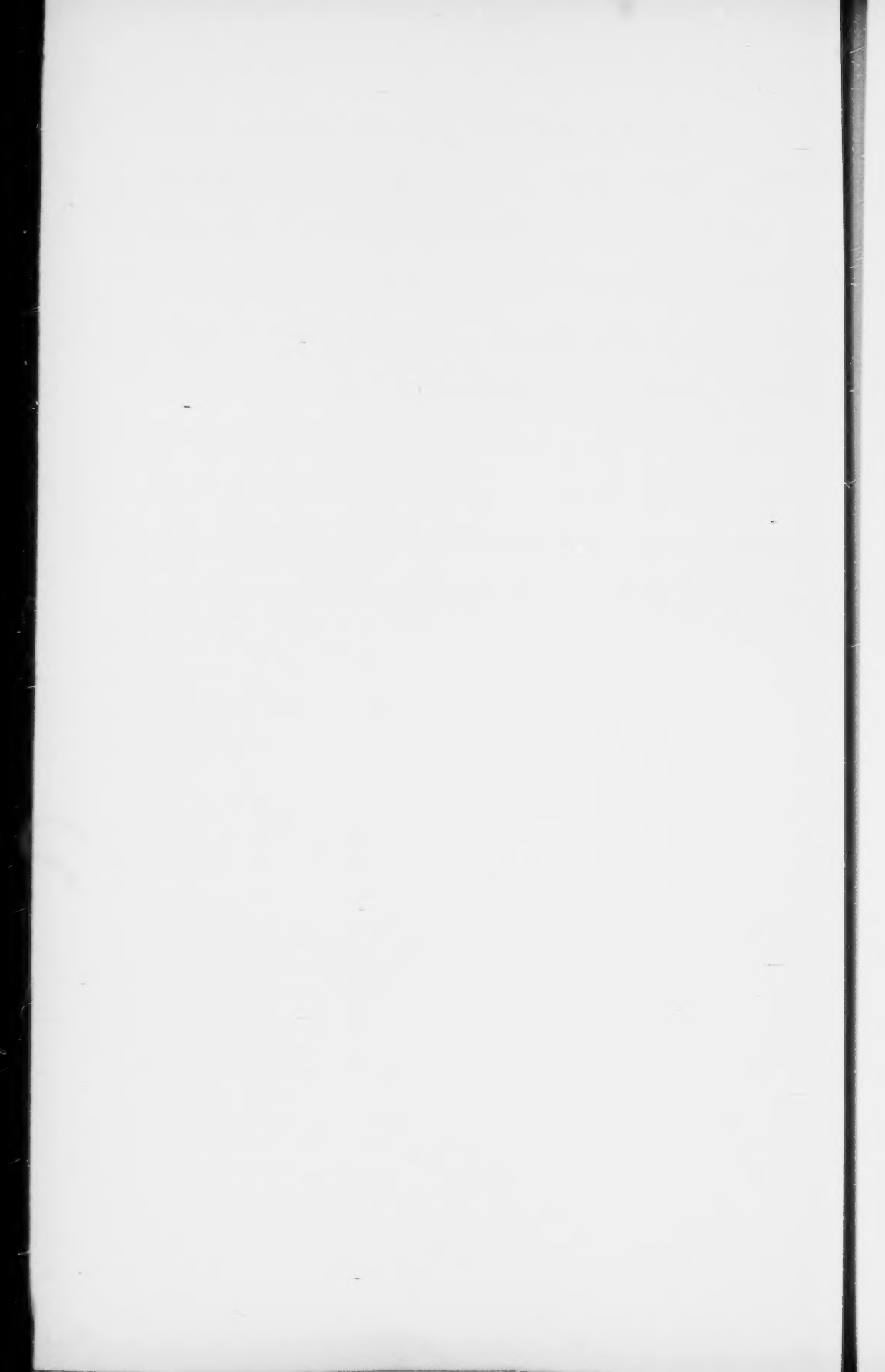


his own separate financial matters and that the couple viewed their incomes and expenses as separate (Tr. 21), the Tax Court wrote that Mrs. Sanders' contention that the couple's property was not community property was an unsupported one. (Opinion at

As a result, the Tax Court determined that Mrs. Sanders had made a bona fide attempt to report her share of her husband's earnings and that because she failed to do so, the deficiencies were still due. The Court did not find her failure to be attributable to negligence or intentional disregard of the rules and regulations, and no additions to tax were approved under Section 6653(a). The Court did, however, assess the additions to tax under Section 6654(a) for failure to pay estimated tax.



The decision of the Tax Court left the Appellant liable to the federal government for unpaid marital income taxes, a consequence which befell her despite a pre-marital agreement to transmute community property into separate property and ultimately attributable to the stubbornly elusive husband of the Appellant, his invisible income, and his proclivity for challenging the tax laws.



STANDARD OF REVIEW

Pursuant to Local Rule 13(b)(2), the standard of appellate review presented herein is based upon issues involving generally undisputed facts and thus present only questions of law. United States v. Singer Manufacturing Company, 374 U.S. 174 (1963).



ARGUMENT

I. APPELLANT'S ORAL AGREEMENT,
CONDUCT AND TESTIMONY OVERWHELMINGLY
PROVED A VALID TRANSMUTATION OF
COMMUNITY PROPERTY INTO SEPARATE PROPERTY
DESPITE JOINT BANK ACCOUNT

Husbands and wives have, for many years entered into casual, yet enforceable, oral agreements to convert their community property into the separate property of one or both of the parties. See, e.g., Beatrice Aronov v. Commissioner, 29 T.C.M. 1079 (1970-246). Indeed, the United States Court of Appeals for the Ninth Circuit has declared that oral agreements are sufficient to change community property to separate property or vice versa. Katz v. United States, 382 F.2d 723, 729 (1967).

Moreover, the United States Tax Court has specifically sanctioned an oral agreement to treat income as separate



property in the community property state of Arizona. Grant E. Naegle v. Commissioner, 24 T.C.M. 1099 (1965-212). Like other community property jurisdictions, Arizona imposes a strong presumption, rebuttable only by clear and convincing evidence, that all property acquired during marriage is community property, Evans v. Evans, 79 Ariz. 284, 286, 288 F.2d 775,777 (1955), Edwards v. Commissioner of Internal Revenue, 680 F.2d 1268, 1271 (1982). However, the Tax Court has previously found sufficient evidence to rebut the presumption of community property even where the taxpayer has made statements or manifested conduct which conflicts with a pre-existing oral transmutation agreement. Aronov, supra, at 1083.

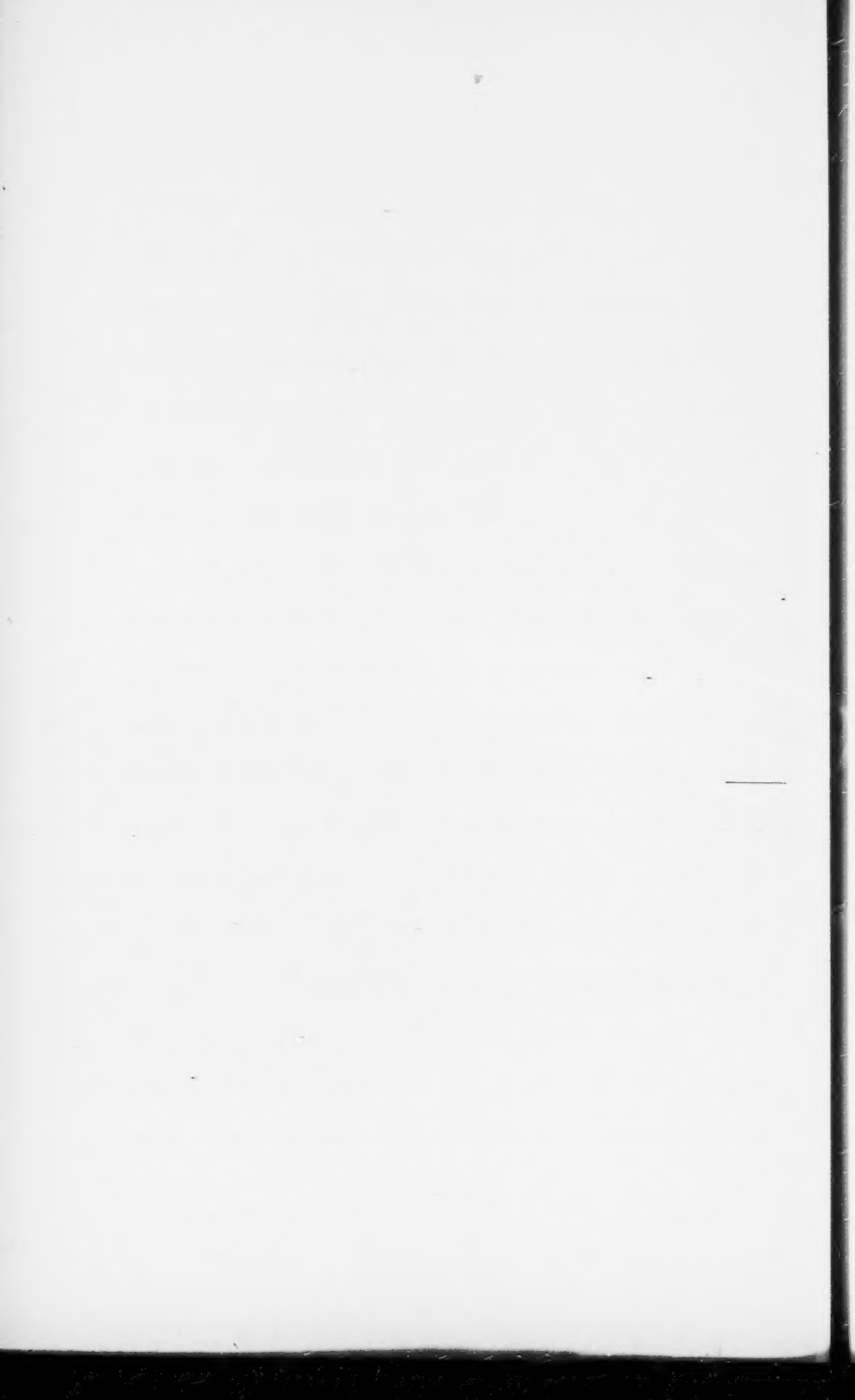
In the instant case, Appellant sought advice from her preparer, the IRS



and the state of Arizona as to the proper means of filing her tax return. (Opinion at A-16). She was advised to write a note explaining her situation. The note she attached to her 1981 tax return misleadingly referred to "community property income" and said the taxpayer was reporting only her income and related expenses and has no knowledge of her husband's income. (Opinion at A-16, Tr. 11-12.)

Even if this note could be construed to be an admission of community property, it really amounts to nothing more than misleading conduct which conflicts with the actual separate property status that existed. Such a confusing discrepancy is nonsense and should be disregarded in this case as it was in Aronov, at 1083.

If by some remote construction, the Appellant's note is construed to mean something, it ought to mean that the



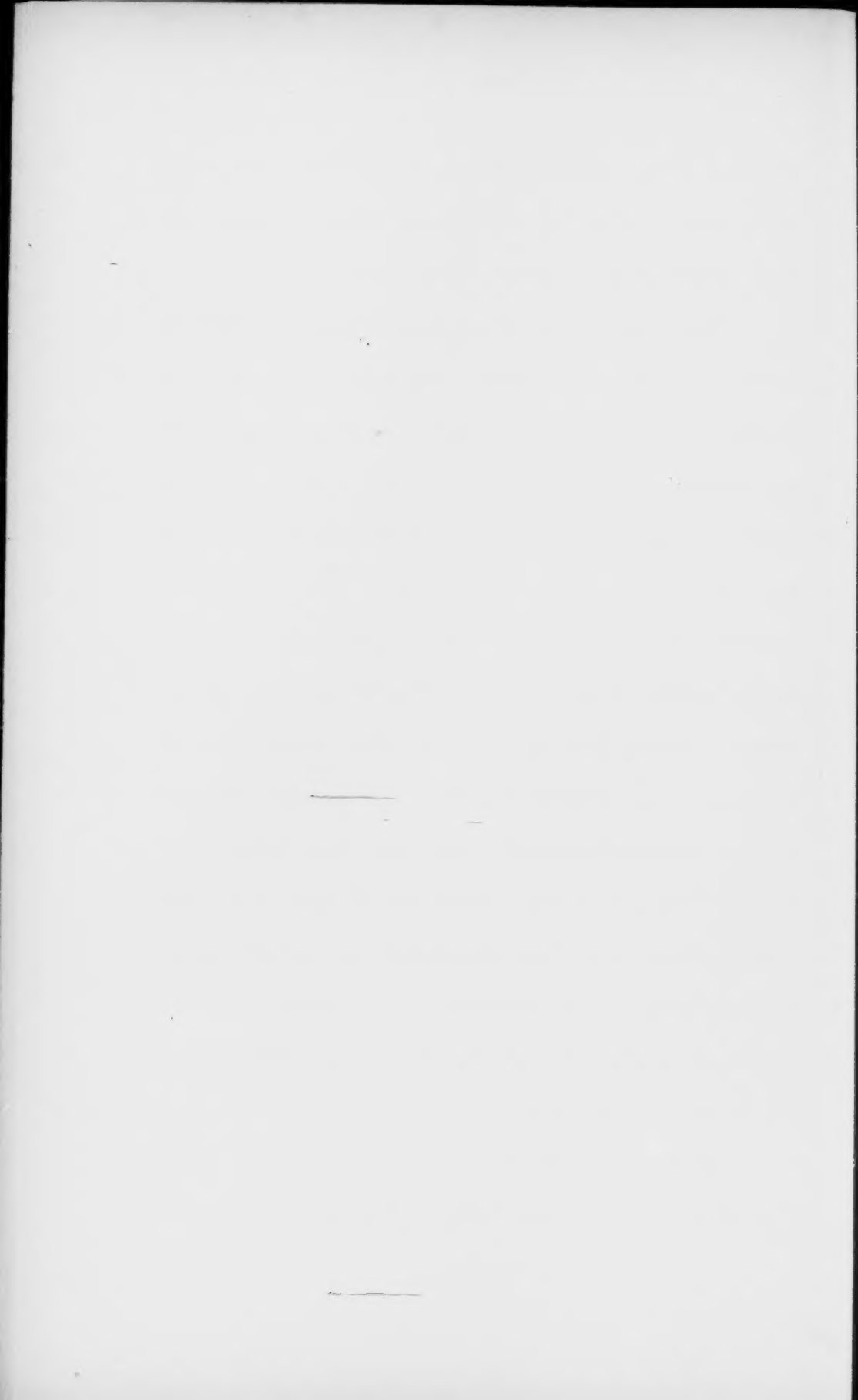
Appellant is reporting only her income and expenses because that is all she could ascertain. As she testified, all she knew is what her husband deposited into the checking account (Tr. 12), and the account has no effect on the separate property status.

The case raises, perhaps ultimately, a question as to what control, disposition or segregation of funds is required by a married person in a community property state in order to demonstrate that those funds were to be treated as separate property. The Appellant herein has repeatedly asserted her desire to be treated as an individual, to be individual and self-sufficient. (Tr. 12.) Her husband, a tax-dodging activist, has testified that he maintained a personal file, secreted from his wife all information and documents revealing his earnings

or his job, and agreed with her, before marriage, how to separate their earnings and expenses. (Tr. 22-23.)

The Tax Court apparently believes that the shared bank account supports a community property lifestyle. (Opinion at A-20). But in fact, that was not the case. The shared bank account was, as a matter of convenience, the single depository of funds contributed by the Appellant and her husband from their individual incomes for the purpose of paying the respectively assigned debts. It is preposterous for the Tax Court to even imply that the incomes of the Appellant and her husband somehow lost their separate property status simply because some of the funds were commingled in a checking account.

More than a century ago, the California Supreme Court declared that to



maintain the character of separate property, it is not necessary that the property of either husband or wife be preserved in specie or kind. Said the high court: "It may undergo mutations or changes, and still remain separate property; and as long as it can be clearly and indisputably traced and identified, its distinctive character will remain." Peck v. Vandenberg, 30 Cal. 11, at 39 (1866), citing Ross v. Houston, 11 Tex. 326.

The Court of Appeals for the Ninth Circuit followed up this decision some years later by finding that Arizona has adopted a "very liberal rule as regards the right of husband and wife to deal with each other concerning respective interests in property," and this rule permits property transmutations in accordance with the intention of the



parties. Greenwood v. Commissioner of Internal Revenue, 134 F.2d 915, 919 (1943).

The Court of Appeals in this Circuit also ruled that a taxpayer's insurance policies could be treated as separate and individual property even after the premiums for the policies were paid from community funds. Kroloff v. United States, 487 F.2d 334 (1973), citing also Jones v. Rigdon, 32 Ariz. 286 at 291, 257 P. 639, at 640 (1927) (that extrinsic evidence, including the testimony of witnesses, is admissible to prove that property may be the separate property of the wife even where it appears that property was paid for with community funds).

The Supreme Court of Arizona has modernized the sentiment of the federal courts by ruling that commingling of property does not stamp a bank account



with community status if the identity of the separate property is not lost. Porter v. Porter, 67 Ariz. 273, 195 P.2d 132 (1948). Other states have even gone further in protecting the wife's right to claim separate property. See, e.g., Trorlicht v. Collector of Revenue, 25 So.2d 547 (1946) (where a Louisiana Court of Appeals allowed wife to select her husband as her agent to administer her separate property without changing the character of the property to community property.)

More recent decisions have not broken the trend. Under Arizona law, in fact, married couples may establish an intention to change the status of their property by their conduct, In re Sims Estate, 13 Ariz.App. 215, 475 P.2d 505 (1970), but once fixing the property as either separate or community property, it



retains that character until changed by agreement or by operation of law. Armer v. Armer, 105 Ariz. 284, 463 P.2d 818 (1970), and Porter, supra. The collective effect of these two rules only underscores the liberal attitude that Arizona has taken. To wit, a husband and wife may transmute property by conduct alone, but an agreement or a law must intercede to rescind that transmutation.

Our Appellant, Mrs. Rose Sanders, entered into an oral antenuptial agreement to treat her earnings and those of her husband as separate property. She enjoyed no benefit from the money her husband earned. (Tr. 13.) She even objected to his failure to report taxes. (Tr. 14.)

As co-owners of a bank account, their relationship was anything but marital in nature. They each deposited

separate amounts of money from their separate earnings (Tr.9). Mrs. Sanders paid the telephone and electric bills and she bought groceries (Tr. 9), while Mr. Sanders paid off a Visa credit card account and wrote checks for the support of his children from a prior marriage. (Tr. 9.) When Mrs. Sanders ultimately sought to prepare her tax return, she took her tax information, individually, to H & R Block (Tr. 11).

Clearly the conduct of Mrs. Sanders demonstrates that she acted with the understanding that her earnings were to be separate property. The fact that her funds fell into the same account, for a time, with some of her husband's funds, does not destroy the valid oral transmutation of the property into separate property status. The law is unequivocal: when separate funds are placed in a joint



checking account, no presumption arises that the owner of those separate funds has made a gift of one-half of the funds to his spouse. Noble v. Noble, 26 Ariz. App. 89, 546 P.2d 358 (1976), Bowart v. Bowart, 128 Ariz. 331, 625 P.2d 920 (1981). And perhaps more importantly, it would work an injustice to fuse together all the funds in the bank account since the Appellant's funds were the product of her occupation only. The profits of a spouse are either community or separate, based upon whether they are the result of the individual toil and application of the spouse. Rundle v. Winters, 298 P. 929, 931 (1931). Simply stated, this case revolves around separate property. Transmutations of that property to community property by operation of law does not occur simply because of commingling. Potthoff v. Potthoff, 128 Ariz. 557, 627



P.2d 708, 713 (1981), Bourne v. Lord, 19 Ariz.App. 228, 506 P.2d 268 (1973). In fact, Arizona now holds that where property is purchased on credit as separate property, its status remains such even if community funds are used to pay off the debt. Potthoff at 712.

Respondent-Appellee's reliance on Beall v. Commissioner of Internal Revenue, 82 T.C. 70 (1984) makes for a faulty comparison. The petitioner in Beall presented no evidence that she was entering into a separate property agreement with her husband, at 72. She never manifested an intent to waive her future interests in her husband's earnings, at 72. Indeed, the entire premises of Beall revolved around a ruse, that is, a so-called vow of poverty orchestrated to leave the taxpayers with no apparent income.



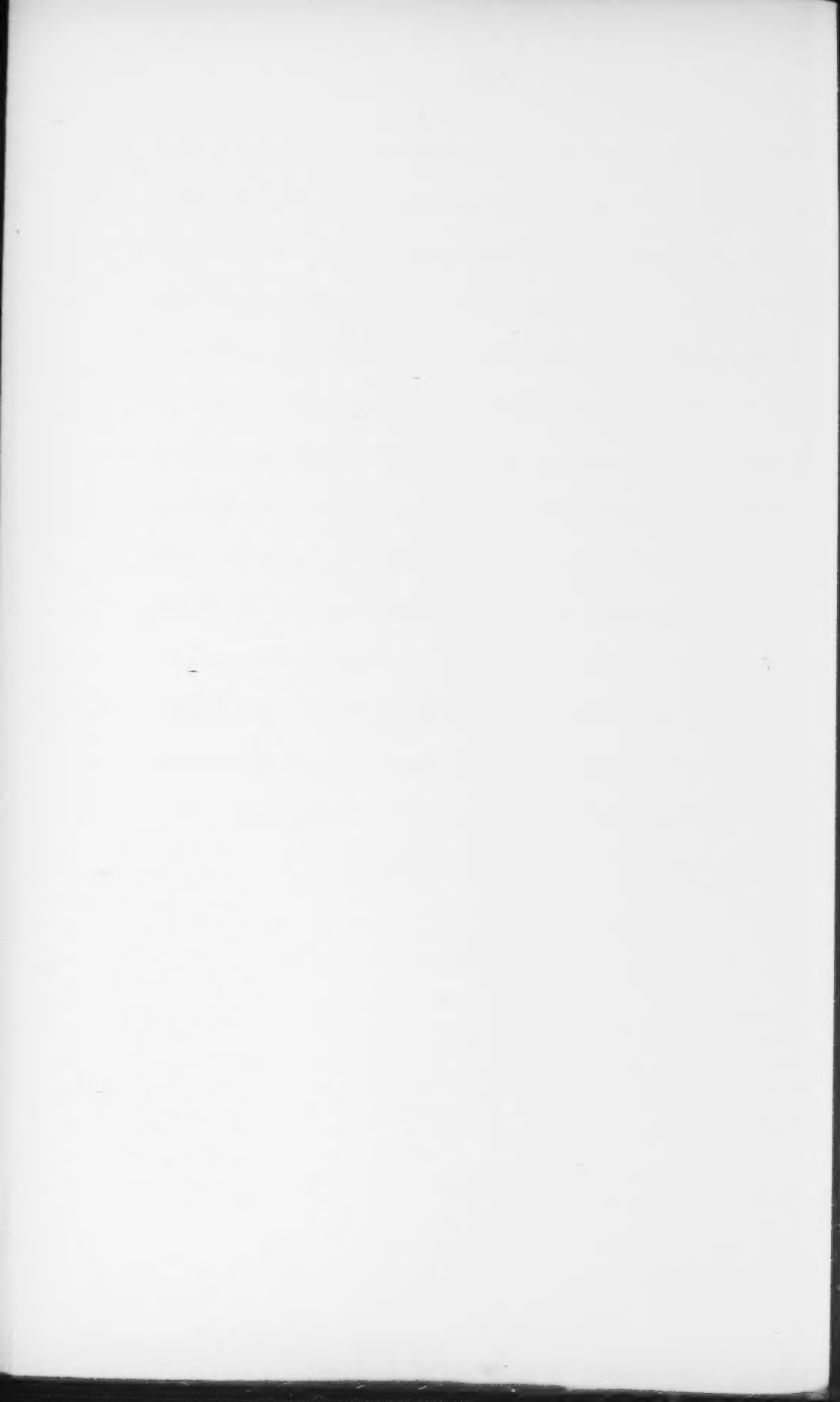
The instant case is blatantly different for obvious reasons. What's more, Judge Cohen's reliance on Beall only actually stands for a reiteration of the Arizona community property law, Ariz. Rev. Stat. Ann. sec. 25-211 (Opinion at 4). By citing Beall, Judge Cohen essentially shows a preference for a prior decision of her own, but she fails to distinguish the obvious factual differences between two cases.

The reality of this marriage relationship was that an oral agreement existed, and it was supported by independent conduct of the husband and wife. Both the agreement and the conduct effectively transmuted the property in separate property -- even though either the agreement or the conduct would have sufficed. The joint bank account was nothing more than a convenience for the

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parties, and the separateness of the couple's funds was retained at all times by virtue of the acquisition of those funds, the depositing of those funds and the ultimate expenditure of those funds.

The United States Tax Court erred by not recognizing Arizona's law, and the federal case precedent, allowing transmutation in a community property state, and it myopically viewed the facts without considering the intent and circumstances of the husband and wife herein. As such, the deficiencies were improperly assessed and should now be reversed and eliminated.



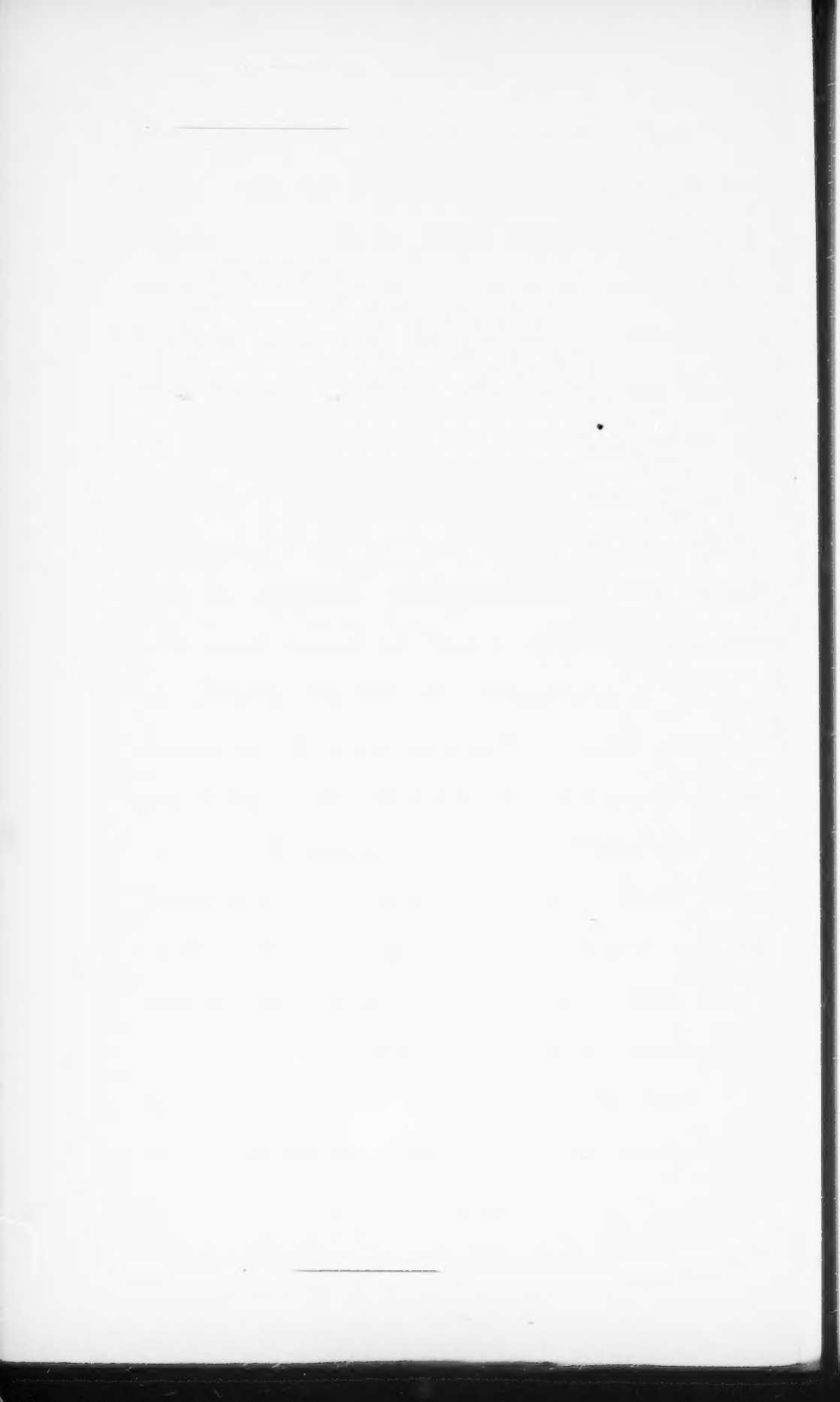
II. APPELLANT SHOULD BE TREATED
AS AN INNOCENT SPOUSE BECAUSE THE
FACTUAL CIRCUMSTANCES REFLECT THAT SHE
IS THE KIND OF LAW-ABIDING TAXPAYER
THE CODE SEEKS TO PROTECT

Appellant should be treated as an innocent spouse and relieved of liability attributable only to the negligence or frauds of her husband. It is clear that the Internal Revenue Code addresses the issue of community property in a manner oriented toward the protection of innocent taxpayers. Section 66(c) provides that a spouse may be relieved of liability if the individual establishes that he or she did not know of, and had no reason to know of, the specific item of community income, at 66(c)(3), and taking into account all facts and circumstances, it is inequitable to include such item of community income in such individual's gross income, at 66(c)(4).



Here, the Appellant obviously did not know what her husband earned. (Tr. 4.) The husband even testified, under oath, that he didn't discuss his income with the Appellant at any time during their marriage (Tr. 20-21), and refused to even indicate his income on his own tax returns (Tr. 21-22). Hence, to include in the Appellant's income the unknown and undiscoverable amounts of her husband's income would be inequitable and instantly repugnant to the philosophy of Section 66(c). Section 66(c)(4) requires the taking into account of "all facts and circumstances." It is respectfully argued that the facts and circumstances herein yield to a finding that the Appellant was innocently blinded as to her husband's financial affairs.

The philosophy is nearly identical in Section 6013(e), which governs relief



from liability for understatements made on tax returns. Section 6013(e)(1)(D) reiterates the policy of taking into account "all the facts and circumstances."

It is conceded that Section 6013 applies to those individuals filing a joint income tax return, at 6013(e)(1)(A), as argued by the Respondent in the Tax Court (Memorandum Brief for Respondent, at 7). However, the purpose of that section, known as the innocent spouse provision, is to alleviate inequities arising out of joint and several liability for tax, interest and additions to tax on the aggregate income of the parties to a joint return. See section 6013(d)(3); S.Rept. No. 91-1537 (1970), 1971-1 C.B. 606-607. Chapman v. Commissioner, T.C.M. 1982-695.

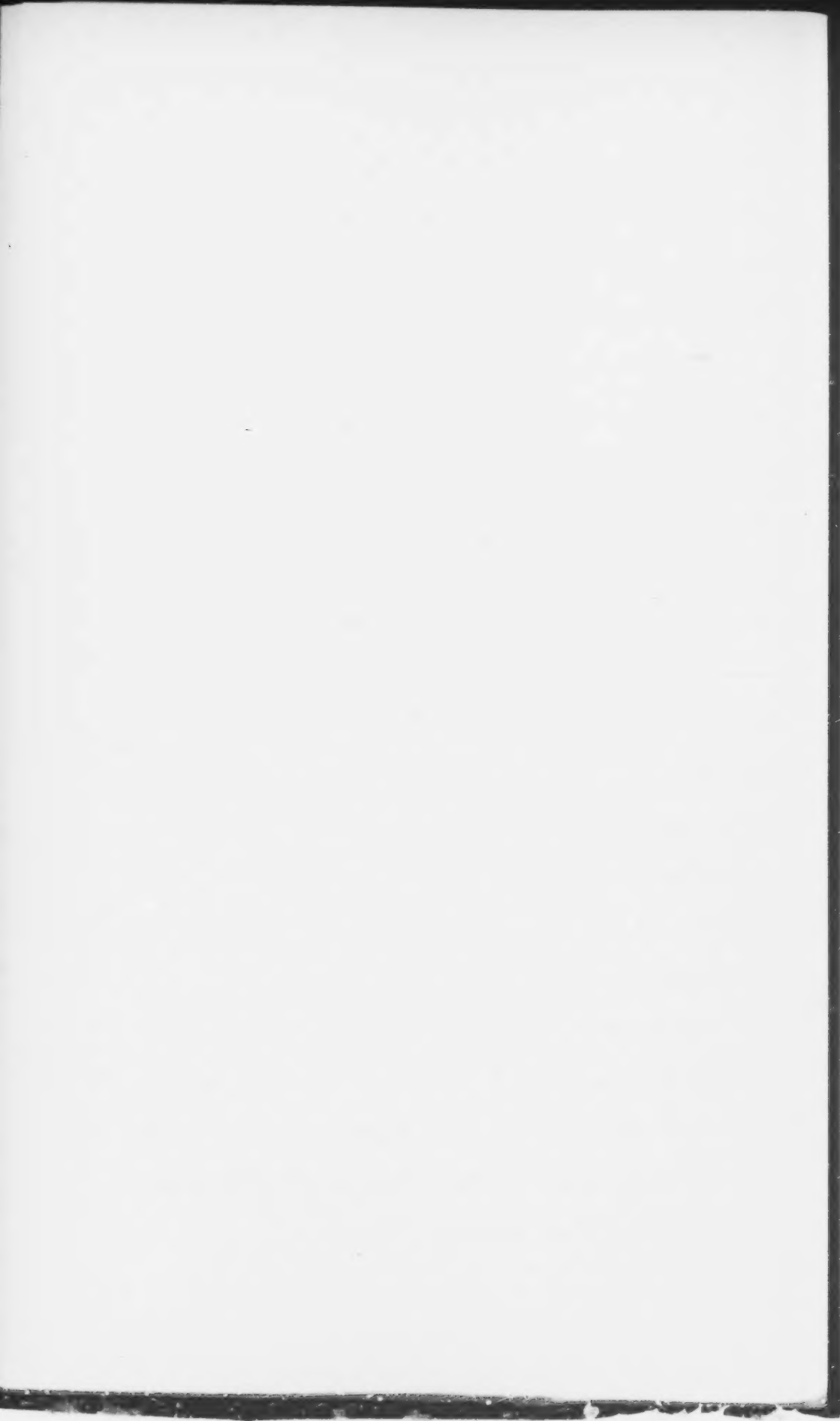
There is no reason that the intent and philosophy of Congress in protecting



spouses who file joint returns should not be extended to innocent spouses, like the Appellant herein, whose filing status was married filing separate return.

The Appellant here is just as much an innocent spouse as any appellant conceived by the drafters of Section 6013. She did not know, or could have known, about her husband's income. The facts and circumstances of her husband being a tax revolt activist underscore the likelihood of her understating community income (if, in fact, their income is construed as community income). Without question, it would be inequitable to assess against her the unreported, albeit unknown, earnings of her husband.

Arguably, the single difference between a technical innocent spouse under Section 6013 and this Appellant is that this Appellant chose the married-but-filing-separate filing status.



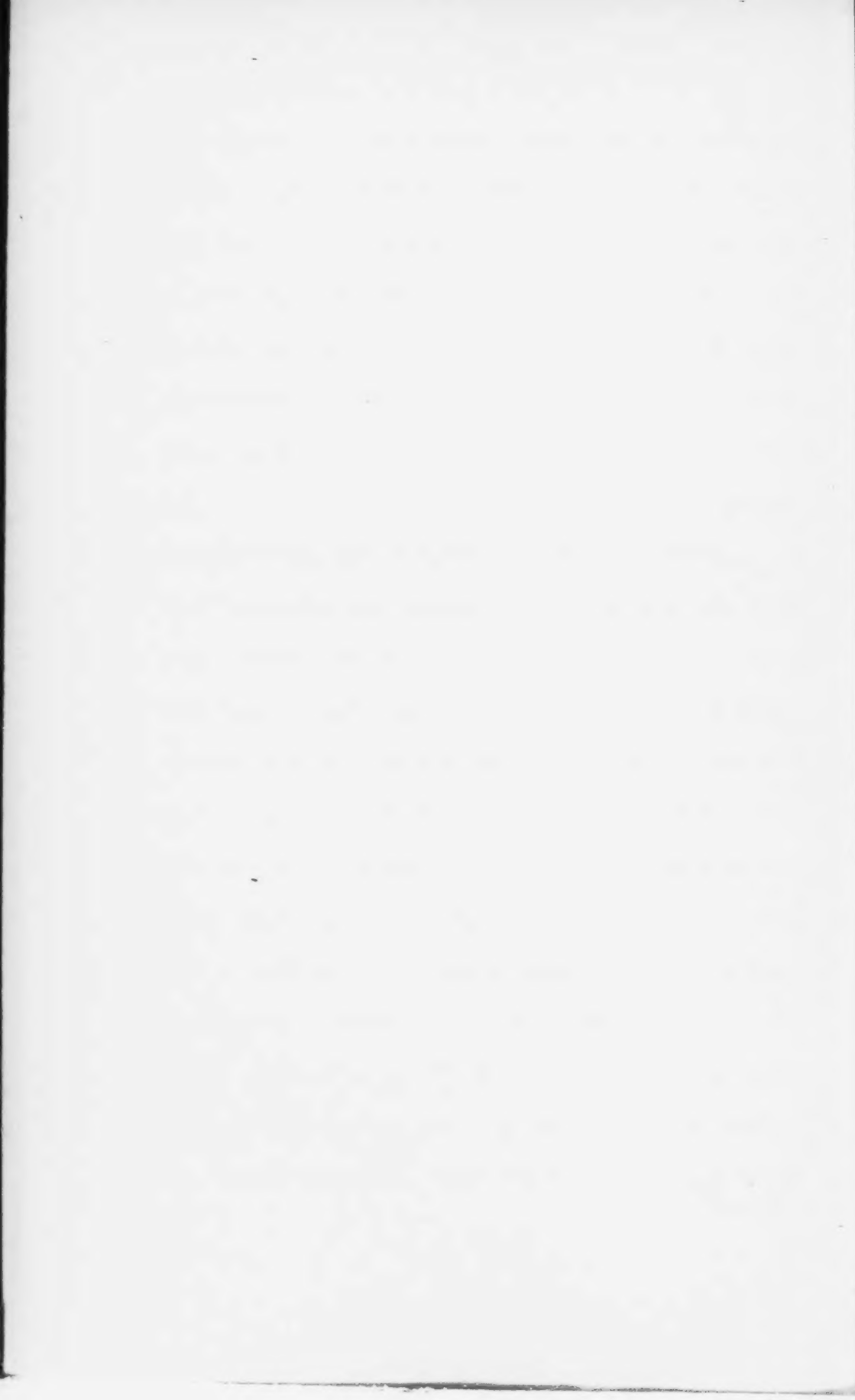
Appellant is nonetheless an innocent victim of her husband's scheme. Equity and due process command that she be insulated.

Furthermore, when Congress acted in 1971 to enact the innocent spouse provision, they were alert to the hardships on innocent wives not responsible for the omission of income from the return and against whom deficiencies were being assessed. See, e.g., Scudder v. Commissioner, 48 T.C. 36 (1967). Their motive was to protect those who file joint returns, but it was not to allow inequities for that mass of others who, while married, filed separate returns. IRC (1954), Sec. 6013(e), added by Sec. 1 of P.L. 91-679, 91st Cong., 2nd Sess., approved Jan. 12, 1971.

Appellant Rose Sanders testified in the Tax Court that she received no

benefit from the earnings -- whatever they were -- of her husband (Tr. 12). The burden of going forward then shifted to the Respondent to show receipt of a specific significant benefit by the innocent spouse. However, the Respondent never showed any such benefit in the case below.

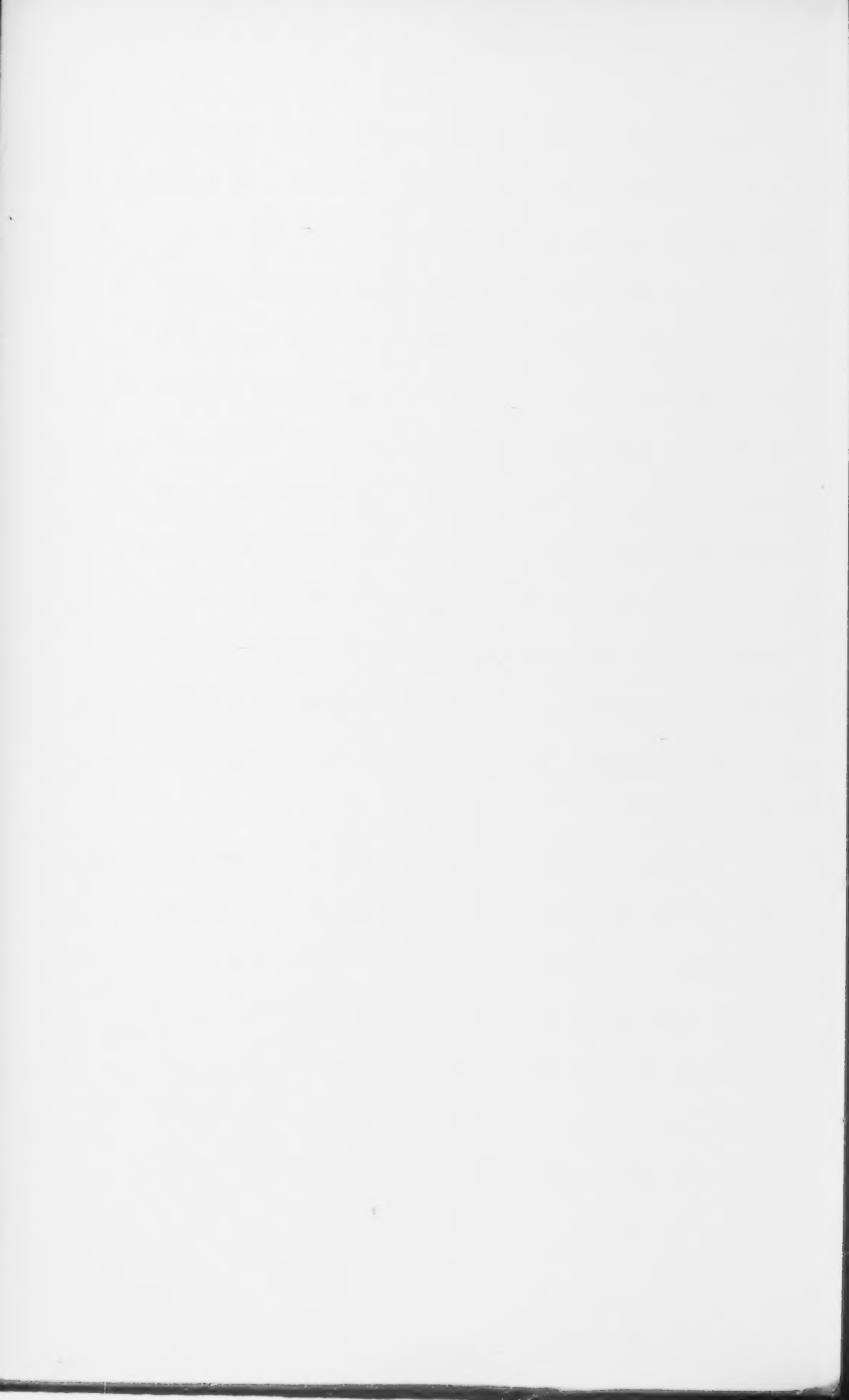
When Congress enacted the provision, the Senate Finance Committee pointed out that it is not enough to find that the spouse benefitted from the omitted income. Rather, there must be a finding that the benefit was significant and not inequitable to hold the spouse liable for the tax deficiency in view of all the facts and circumstances. Sen.Rep. No. 91-1537, 91st Cong., 2nd Sess., p.3 (emphasis added). Assuming then, that Appellant is the essence of an innocent spouse, Respondent-Appellee has made no



showing, nor can it be made, that Appellant enjoyed a significant benefit of her husband's unreported income.

The legislative history of the statute which permits a husband and wife to file single income tax returns and which relieves the spouse of liability in certain cases indicates that the statute was designed to bring government tax collection practices into accord with basic principles of equity and fairness. 1970 U.S. Code Cong. & Admin. News at 6089, United States v. Dioguardi, 350 F.Supp. 1177 (1972).

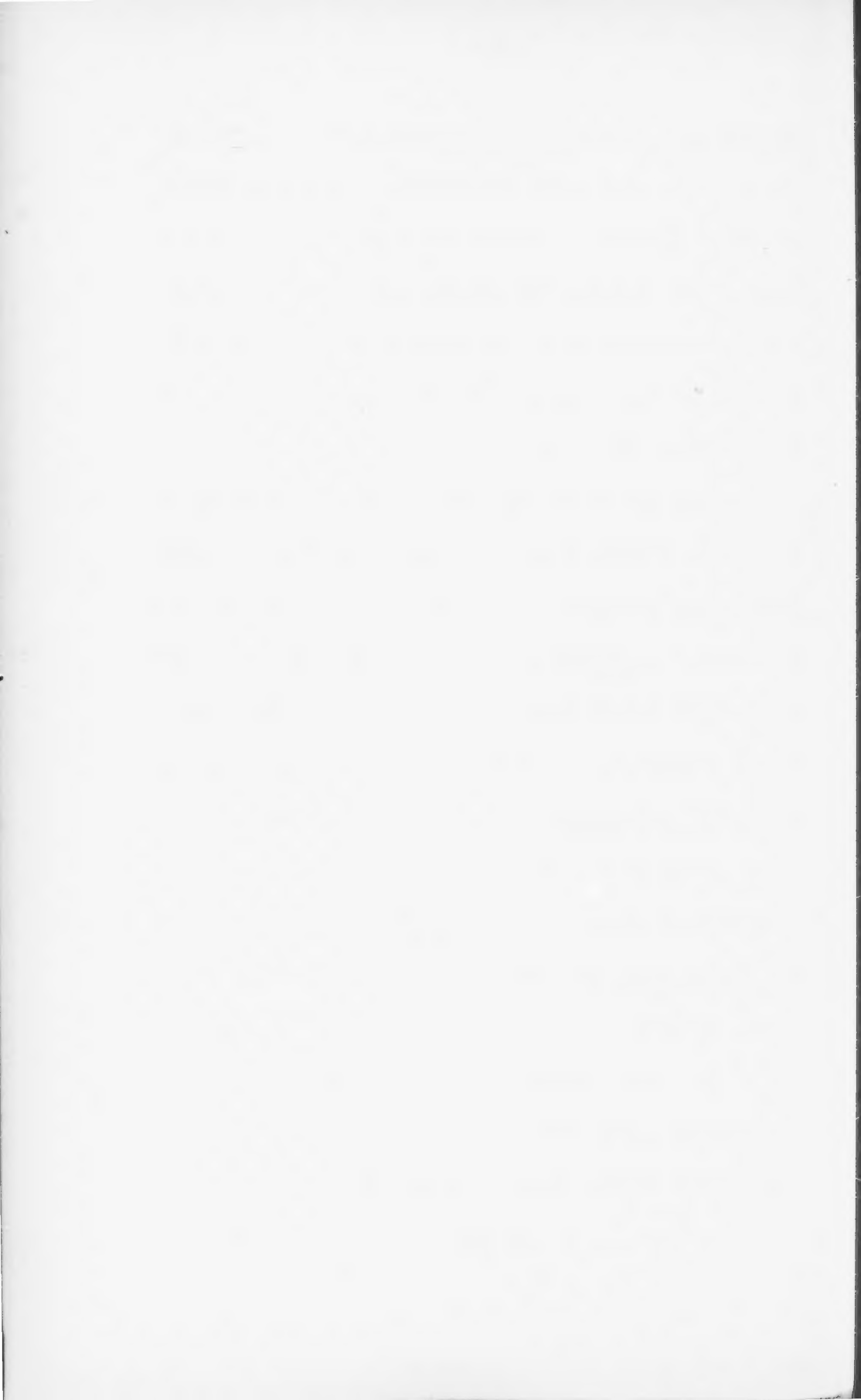
What ultimately counts is whether the wife knows of her husband's other income. If the wife knows that her husband has additional income not reported to the IRS or she evidences that knowledge by her conduct, then the innocent spouse provisions are inapplicable.



Doris Swofford v. Commissioner, T.C.M. 1975-148. If she honestly does not know of her spouse's other income, as in this case, it would be fundamentally inequitable, unfair and constitutionally objectionable to charge her with knowledge of liability thereupon.

The United States Court of Appeals for the Fifth Circuit has classified the innocent spouse provision as "a remedial statute." Sanders v. United States, 509 F.2d 162 (5th Cir. 1975). To effectuate that purpose, its provisions should be applied liberally in favor of those whom the statute is designed to benefit. (Emphasis added.) Allen v. Commissioner of Internal Revenue, 514 F.2d 908 (5th Cir. 1975).

It is respectfully argued that Congress intended to protect the Appellant in this case, whether by Section



6013 or by constitutional law. The repeated assertion of relying on "all the facts and circumstances," together with the sound case law calling for a liberal interpretation of the innocent spouse provision, illustrates -- and in fact mandates -- that the Appellant herein be protected.

III. APPELLANT'S SEPARATELY EARNED
INCOME REMAINED UNDISTURBED AS LONG
AS HER INTENT AND CONDUCT
REMAINED CONSISTENT

In Arizona, separate property is transmutable into community property and community property is transmutable into separate property under Ariz.Rev. Stat. Ann. 25-211. All that matters is that the parties manifest an intent to carry out the transmutation. Noble, supra.

The state has been consistent in preserving the intended status. Hence, property purchased during marriage with separate property remains separate property. Nace v. Nace, 104 Ariz. 20, 448 P.2d 76 (1968). Separate property of the husband, which contains his wife's name inserted on a deed, does not alter the status of the property as separate. Bourne, supra. Mere commingling does not change it. Bourne, supra. Even when

community funds are used for the maintenance and improvement of separate property, the property remains separate as intended. Horton v. Horton, 35 Ariz. 378, 278 P. 370 (1929).

All of this points to Arizona's interpretation of Ariz.Rev. Stat. Ann. 25-211. The simplistic phraseology of the provision is hardly rigid, and the state obviously, for decades, has sanctified the desired transmutations of the parties.

In the instant case, the Appellant may have mixed and mingled her funds with those of her husband. She may have once or twice shared an expense with him, just as friends, brothers and roommates often share occasional expenses. But these mere mutations in form do not alone work a conversion of the separate property to community property. That kind of trans-



mutation takes place only where the total identity of the separate property is lost. Guthrie v. Guthrie, 73 Ariz. 423, 242 P.2d 549 (1952), Bourne, supra.

Appellant's agreement with her husband to treat their earnings as separate property remained undisturbed by the regular transactions they undertook as individuals or the occasional transactions they undertook as a couple. Their intent and their conduct consistently disclosed a separate approach to income, and every shred of evidence produced by the Respondent is merely evidence of mutations in the form of location of the income.



IV. APPELLANT IS ENTITLED TO
ATTORNEY'S FEES BECAUSE THE
GOVERNMENT'S ACTIONS WERE
UNNECESSARY AND OPPRESSIVE

Appellant hereby annouces her intention to seek attorney's fees on appeal and submits the following argument in support thereof, as required by Rules 14(g) and 13(b)(1)(E) of the Rules of the United States Court of Appeals for the Ninth Circuit.

Additionally, Appellant hereby argues for attorney's fees for the litigation before the United States Tax Court because of the irresponsibility of the Respondent and the unnecessary and oppressive nature of this claim against the innocent Appellant.

A. ATTORNEY'S FEES ARE AVAILABLE
UNDER IRC SECTION 7430

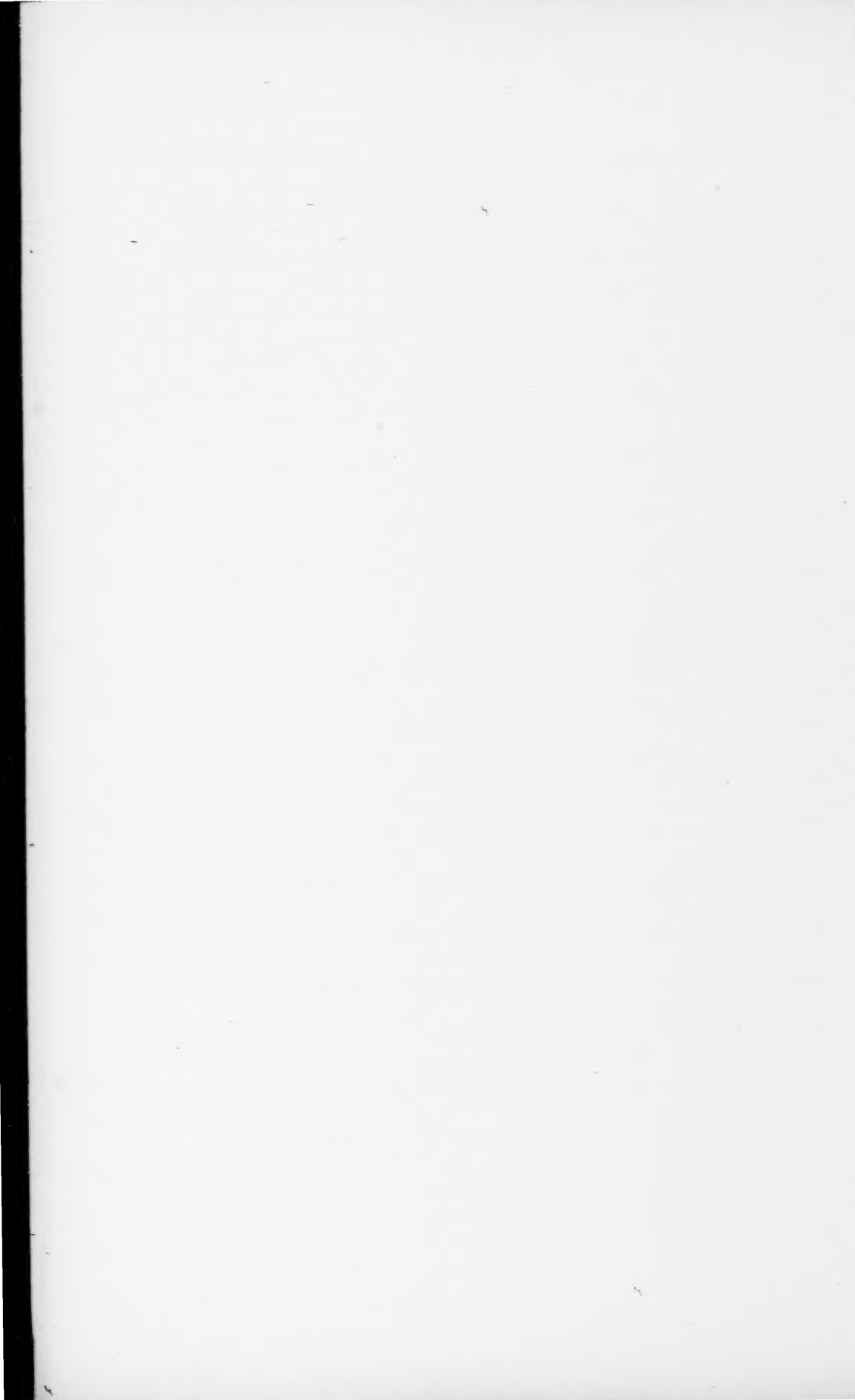
Appellant is entitled to attorney's fees and court costs pursuant to Section 7430 of the Internal Revenue Code of



1954, as amended. This case involves a deficiency notice that was forwarded to the Appellant and an ensuing petition for relief that was filed in the United States Tax Court prior to December 31, 1985, the expiration date of Section 7430. See IRS 7430(f). Because this dispute arose and was commenced in the federal courts before the end of 1985, Section 7430 is applicable.

The Internal Revenue Service was unreasonable in assessing deficiencies against Mrs. Sanders given the separate character of her income. Moreover, the law which apparently propelled the IRS to prosecute Mrs. Sanders unconstitutionally ignores the "innocent spouse" status that befell her even though she did not, technically, file a joint marital tax return.

All of her litigation costs are now allocable to the United States, IRC



7430(b)(3), and all of her administrative remedies have long since been exhausted. IRC 7430(b)(2). Equity and justice now dictate that Mrs. Sanders be entitled to attorneys fees within the statutory limit. IRC 7430(b)(1).

Moreover, she is entitled to these attorney's fees even if she does not prevail on each and every issue in this issue in this appeal. The Code now allows recovery of attorney's fees and costs where the Appellant "substantially" prevails as to the amount in controversy, IRC 7430(C)(2)(A)(ii)(I), or where he substantially prevails with respect to the most significant issue or set of issues presented. IRC 7430(C)(2)(A)(ii)(II).

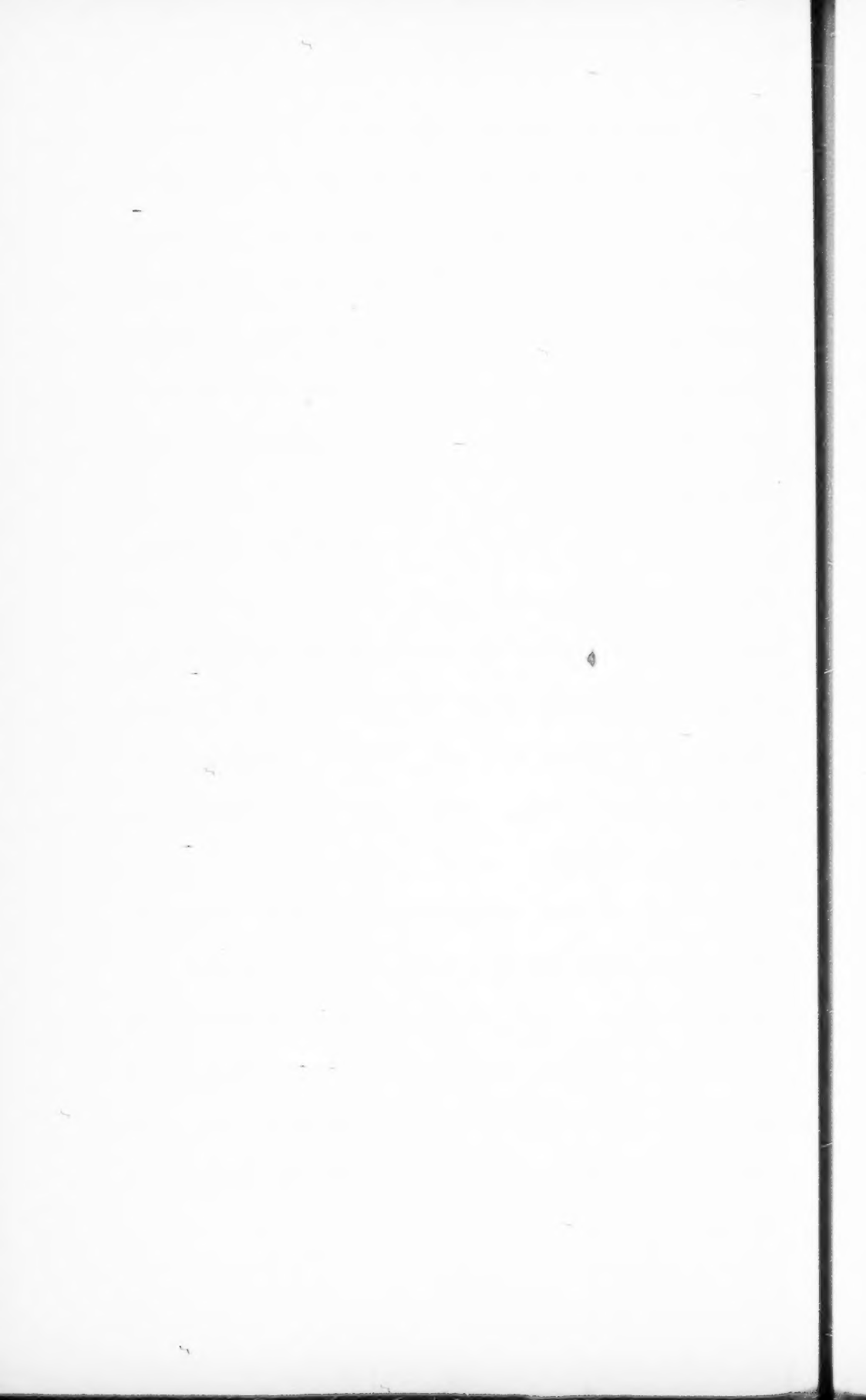
Because the Respondent pursued this matter recognizing the disposition of the Petitioner-Appellant and her husband, and



the circumstances thereof, Respondent should now be held liable for the already accrued attorney's fees (as well as those that will result from this appeal). Appellant is thus timely in her request for attorney's fees now that the extent of the Respondent's unreasonableness has become known.

The case of Rose Sanders is independently illustrative of the reforms Congress sought to achieve in deliberating upon the Tax Equity and Fiscal Responsibility Act of 1982. Pub.Law 97-248, 97th Con., 2nd Sess., Approved, Sept. 3, 1982.

Its chief underpinning was simple: to stop the Government from acting unreasonably. See General Explanation of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), prepared by the Staff of the Joint Committee on Taxation, p.445.



Here, Rose Sanders is an innocent taxpayer who has been forced improperly to spend her own money for attorney's fees. Her position is no different than an innocent securities company that was awarded attorney's fees, Prudential-Bache Securities, Inc. v. A.P. Tranakos, D.C. Ga., 84-2 U.S.T.C. 9793, or innocent taxpayers who are slighted by the IRS' unreasonable pre-litigation conduct. D. Kaufman, CA-1, 85-1 U.S.T.C. 9278.

Consequently, Rose Sanders should be awarded attorney's fees under the Internal Revenue Code.

B. APPELLANT IS ENTITLED TO
ATTORNEY'S FEES UNDER 28 U.S.C.
1920 AS AN ALTERNATIVE REMEDY

Court costs and attorney's fees spelled out in 28 U.S.C. 1920 are concededly unavailable to Appellant under

the Equal Access to Justice Act while IRC 7430 is effective. However, in the event that IRC 7430 is ineffective or inapplicable herein, Appellant is qualified for her litigation costs under 28 U.S.C. 1920.

The United States Supreme Court has ruled that the federal courts, in the exercise of their equitable powers, may award fees when the interest of justice so require. Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943 (1973). The trend has apparently focused on the class of individuals who are benefitted by the prevailing party's victory. That is, attorneys fees should be made to a litigant who (1) furthers the interest of a significant class of persons by (2) effectuating a strong congressional policy. Brandenburg v. Thompson, 494 F.2d 885 (1974). See, also, Local 317, National Post



Office Mail Handlers, Watchmen, Messengers and Group Leaders Division of Laborers', etc. v. National Post Office Mail Handlers, etc., 696 F.2d 1300 (1983).

The Appellant in this matter represents all married women. She represents all innocent spouses and more specifically that class of innocent spouses who are not so technically designated in the Internal Revenue Code but who are equally adversely affected by their husbands' negligent or fraudulent practices.

The Congressional policies at stake here are tax equity, fiscal responsibility and general tax reform. The Appellant instantly epitomizes those policies, for her claim is one which seeks, on behalf of all married women, to strike a new equity, based in individual fiscal fairness and individual accountability.



Her claim is that she, alone, is an innocent and honest taxpayer. She should not, therefore, be de-individualized and classified only as a member of her marriage where the other member of that marriage is, individually, a tax evader.

C. APPELLANT IS ENTITLED TO COSTS
AND FEES UNDER RULE 54(d) OF THE
FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 54(d) provides for costs to the prevailing party. These costs include attorney's fees, and they are generally impossible to assess under after a case has concluded. Indeed, while a prevailing party is permitted in the court's discretion to recover costs necessary to the preparation and presentation of her case, this allocation occurs only after the suit is over. In re Puerto Rico Electric



Power Authority, 687 F.2d 501 (1982).

This being the case, it is now proper for the Appellant to present her claim for costs and attorney's fees for the concluded case below as well as the ensuing appeal herein.

Weighing the actual language, construction, and philosophy of the Internal Revenue Code, and the applicable Federal Rules of Civil Procedure, it is evident that our national policy is to award attorney's fees to people like this Appellant, Rose Sanders. She has suffered an unnecessary and oppressive prosecution for tax deficiencies by a falsely directed government agency operating under the pretense of an income or incorrect tax law.



CONCLUSION

The record as an entirety does not supply evidentiary support for the Order under appeal. The Tax Court, following the Government, unfairly and unconstitutionally, elicited every possible inference against the Petitioner-Appellant from faulty premises.

Mrs. Rose Sanders enjoyed the benefits of a separate property agreement, and the Internal Revenue Service should accord her the corresponding legal status. Her errors or omissions in reporting her income in 1980 and 1981 are wholly attributable to her undesired disposition of being married to a tax protester.

She was, for all practical intents and purposes, an innocent spouse. The record is bare of any direct evidence



that she was told by her husband, or otherwise, would have learned, how much income he earned. As she candidly testified: "I don't see why I should have to run around like a crazy woman before April 15th" to ascertain what the Appellant's husband makes (Tr. 13, 25). In fact, she could not ascertain what her husband earned, for even the federal government has been kept in the dark by Mr. Sanders.

Reductively, then, the basic rationale of the Tax Court is erroneous. The Appellant had a valid oral agreement to treat her property as separate property, and any reporting mistakes by her are attributable to the tax-dodging scheme of her husband, by whom she has been innocently harmed and subjected to federal prosecution. As such, this Honorable Court should declare that the Appellant's



rights are protected, that a separate property agreement existed during 1980 and 1981, and reverse the Order of the Tax Court accordingly.

Respectfully submitted,

Joyce Rebhun

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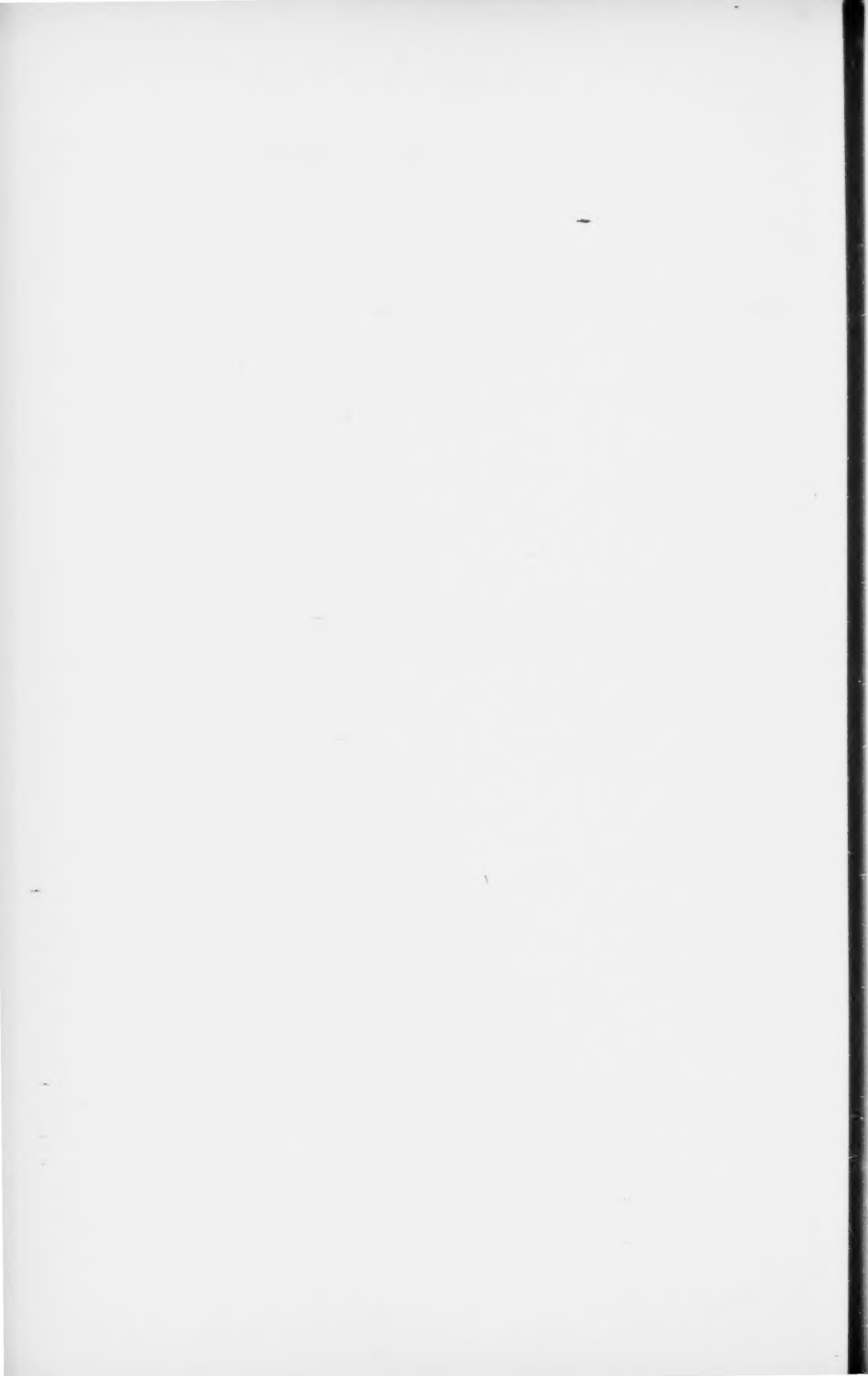


STATEMENT OF RELATED CASES

No other cases in this Court are deemed related to the case at hand.

Joyce Rebbun

ATTORNEY OF RECORD FOR ROSE SANDERS



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 86-7236

ROSE SANDERS,

Petitioner,

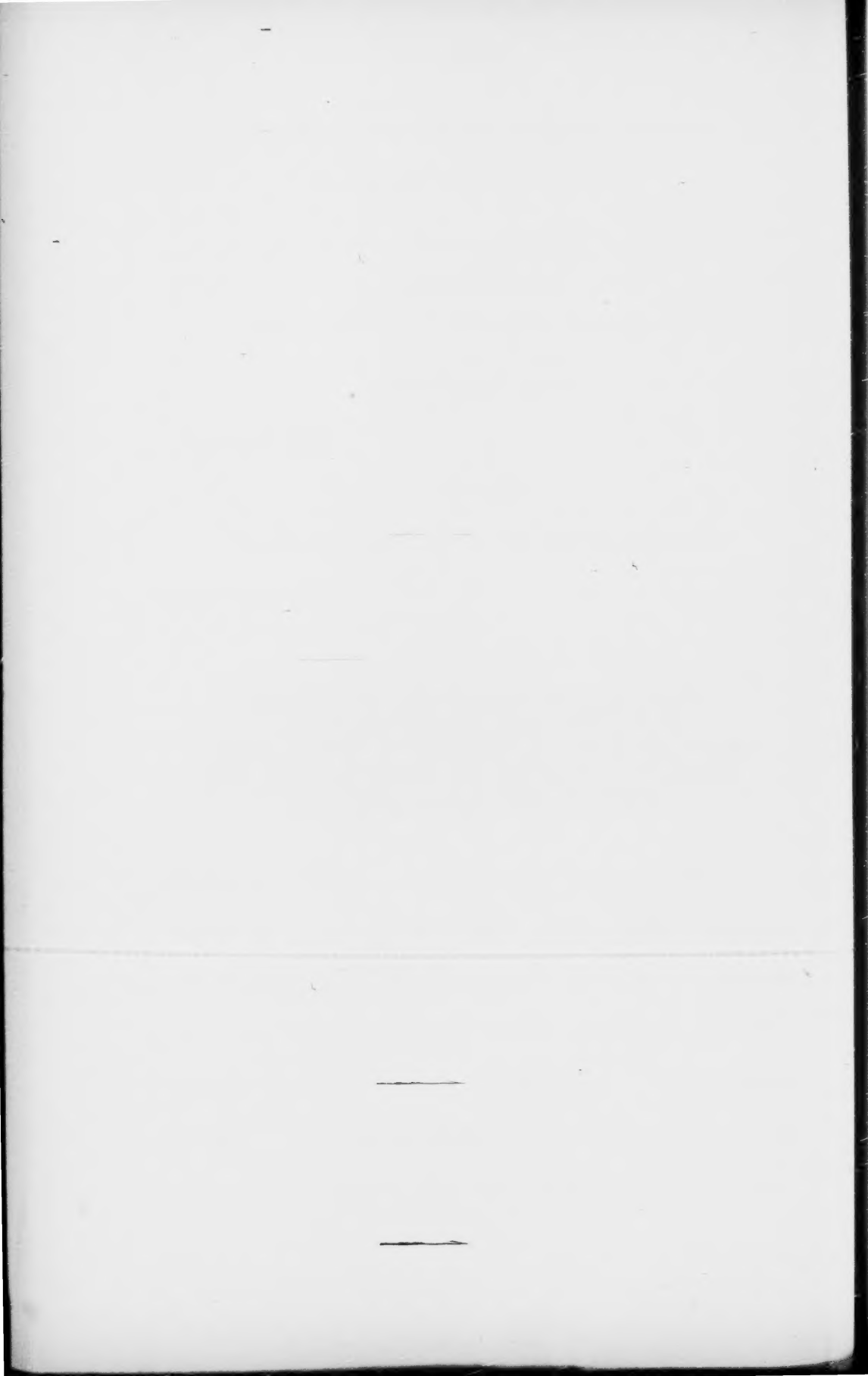
versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MOTION FOR RECONSIDERATION OF
PETITION FOR LEAVE TO FILE
SUPPLEMENTAL APPELLANT'S BRIEF AND
REQUEST FOR STAY OF PROCEEDINGS AND
REQUEST FOR ORAL ARGUMENT

Petitioner-Appellant ROSE SANDERS
hereby petitions the Court for reconsi-
deration of the Order filed September 25,
1986 denying Petitioner's motion of
August 22, 1986 for leave to file a sup-
plemental brief on behalf of the Appel-
lant, for the reasons set forth below:



1. Petitioner-Appellant's opening brief was filed with this Court on July 19, 1986. In said brief, Appellant presented two questions in its Statement of Questions Involved. The second of these questions read as follows: "Whether, as a matter of equity, fairness and due process, a wife-taxpayer ought to be treated as an "innocent spouse" under Section 6013(e) of the Internal Revenue Code of 1954, as amended, or otherwise insulated from liability, where her spouse independently refuses to pay taxes, report his earnings or identify his job and financial position to her and where the wife earnestly attempts to report income as a married individual filing a separate tax return." (Emphasis added.)

2. The second question presented raised the constitutional issues to be



litigated in the instant case.

3. References to the constitutional underpinnings of the case were reiterated within the opening brief, such as in the analysis in Point II regarding the remedial legislative intent of the innocent spouse provision, citing constitutional law, Appellant's Brief at B-37, and the examination of the classification of married women at Point IV, Appellant's Brief at B-49 and by implication in many other locations.

4. Supplemental briefs are authorized for the very purpose of adding citations and explanations to arguments propounded in an opening brief.

5. Neither Rule 28 of the Federal Rules of Appellate Procedure nor the Rules of the United States Court of Appeals for the Ninth Circuit specifically bar this kind of supplemental brief



from being filed.

6. By accepting Appellant's Supplemental Brief, this Court will obtain greater accuracy in its judicial decision-making and will allow for a more economical decision-making insofar as Appellant shall present oral argument on the due process and fairness questions briefed in the original opening brief.

7. The Government, as Appellee, is not prejudiced at all by this Supplemental Brief, and Appellant has made no objection to the filing of a timely Reply to the Supplemental Brief.

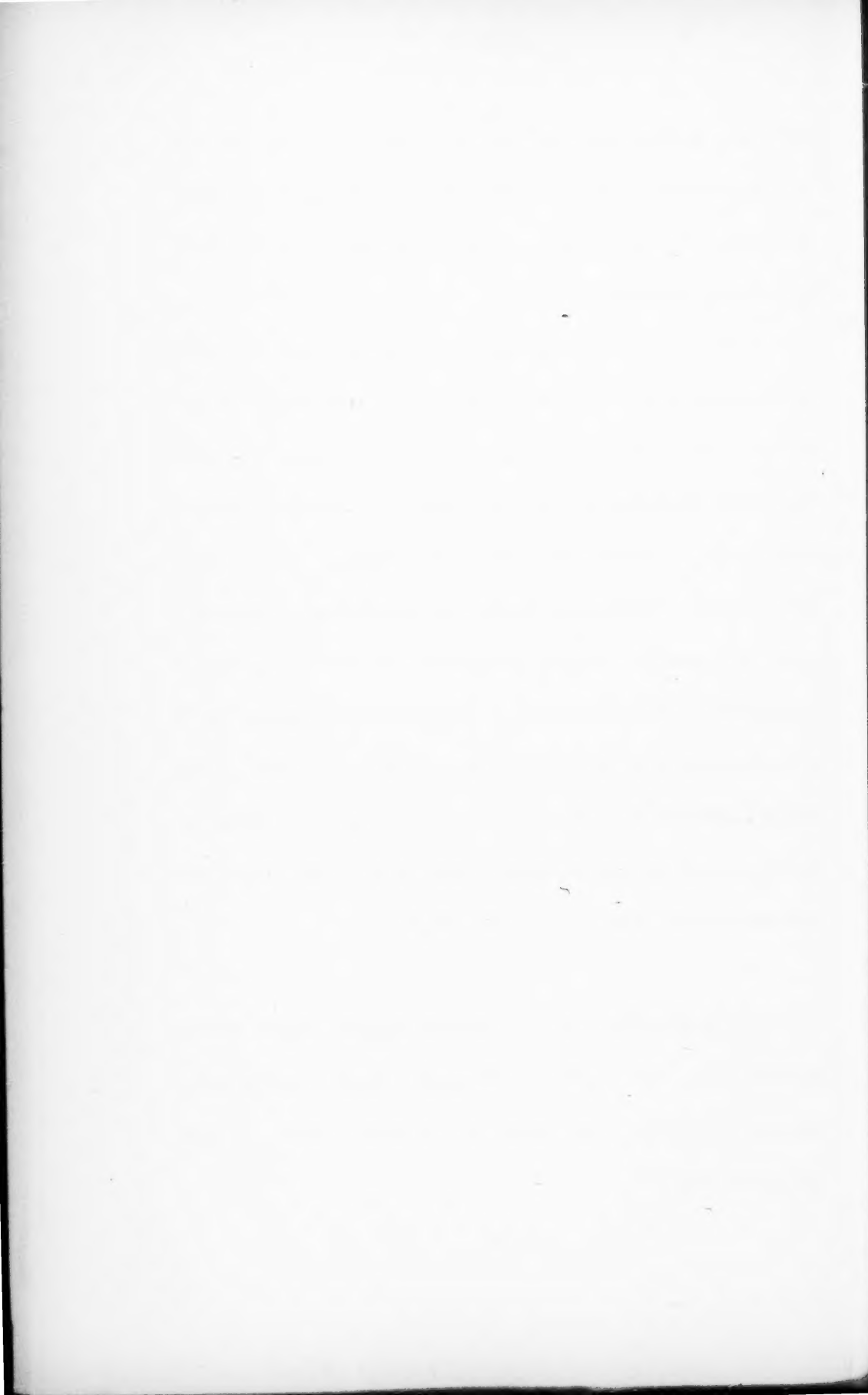
8. Appellant chose to supplement her original brief because the authorities and theories presented in the Supplemental Brief did not come to her attention until after the filing of the original brief. The total amount of time which elapsed between the two briefs is



not so substantial as to leave this well-intentioned Appellant without an opportunity to present the crux of one of her crucial arguments.

9. The arguments presented in the Supplemental Brief involve the due process and equal protection clauses of the United States Constitution. They specifically involve the effects of the Internal Revenue Code on married women, and as such, they present a vital public question of paramount judicial, legal and sociological importance. Denial of the Supplemental Brief essentially blocks Appellant from presenting what may be the threshold argument on appeal.

WHEREFORE, Petitioner-Appellant ROSE SANDERS, by and through her counsel, moves this Honorable Court for the following:



1. An Order, upon reconsideration, granting leave to file the Supplemental Brief with an-appropriate time period for the Appellee to respond thereto.

2. An Order granting a Stay of the within proceedings pending the conclusion of the briefing schedule.

3. An opportunity to present Oral Argument before this Court as to why the Supplemental Brief of the Appellant should now be filed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 86-7236

ROSE SANDERS,

Petitioner,

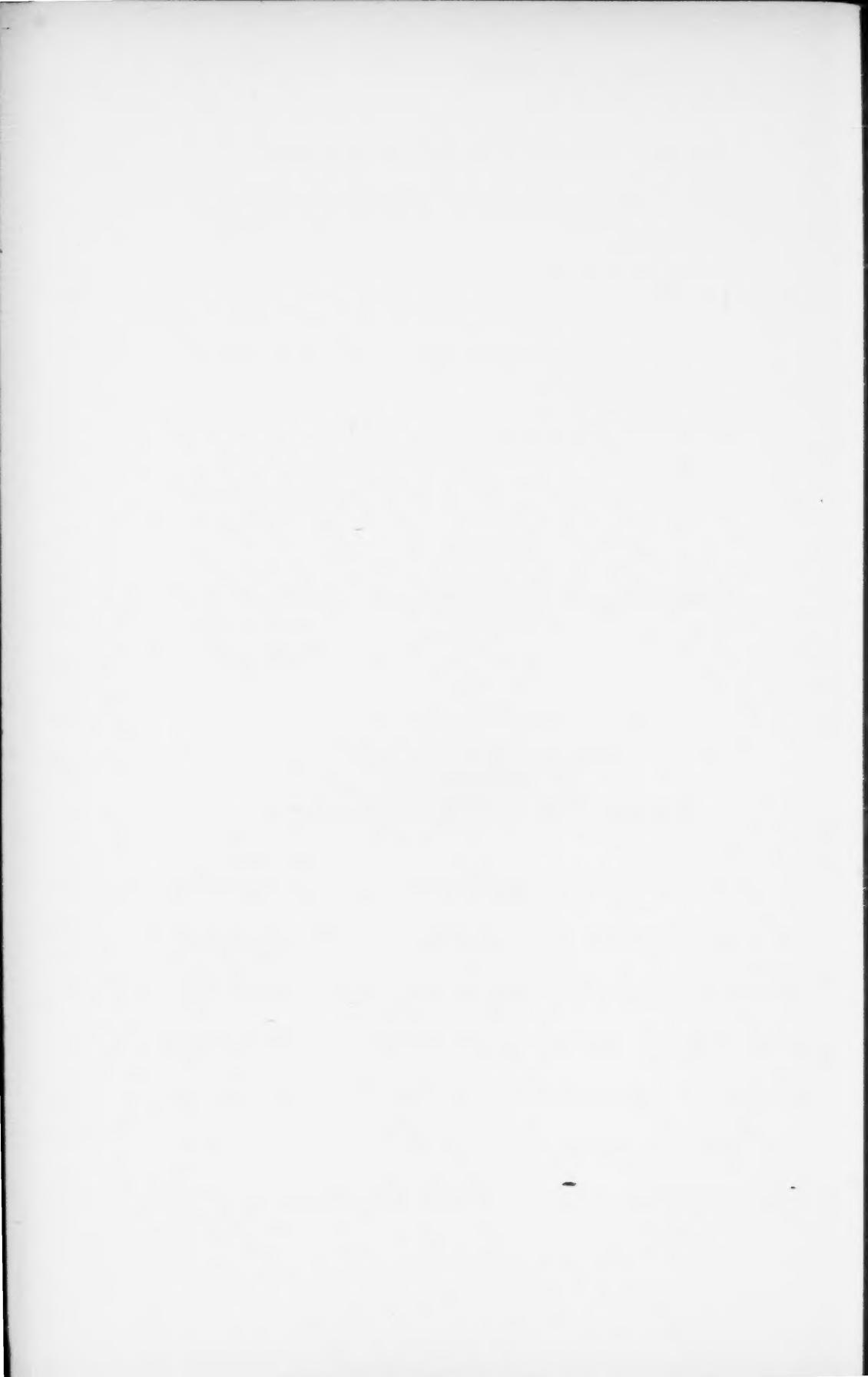
versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

MEMORANDUM OF LAW
IN SUPPORT OF
MOTION FOR RECONSIDERATION

This matter examines the propriety of particular provisions of the Internal Revenue Code against a married woman who previously lived in a community property state. Because of the factual nature of the events which precipitated this case, the United States Court of Appeals for

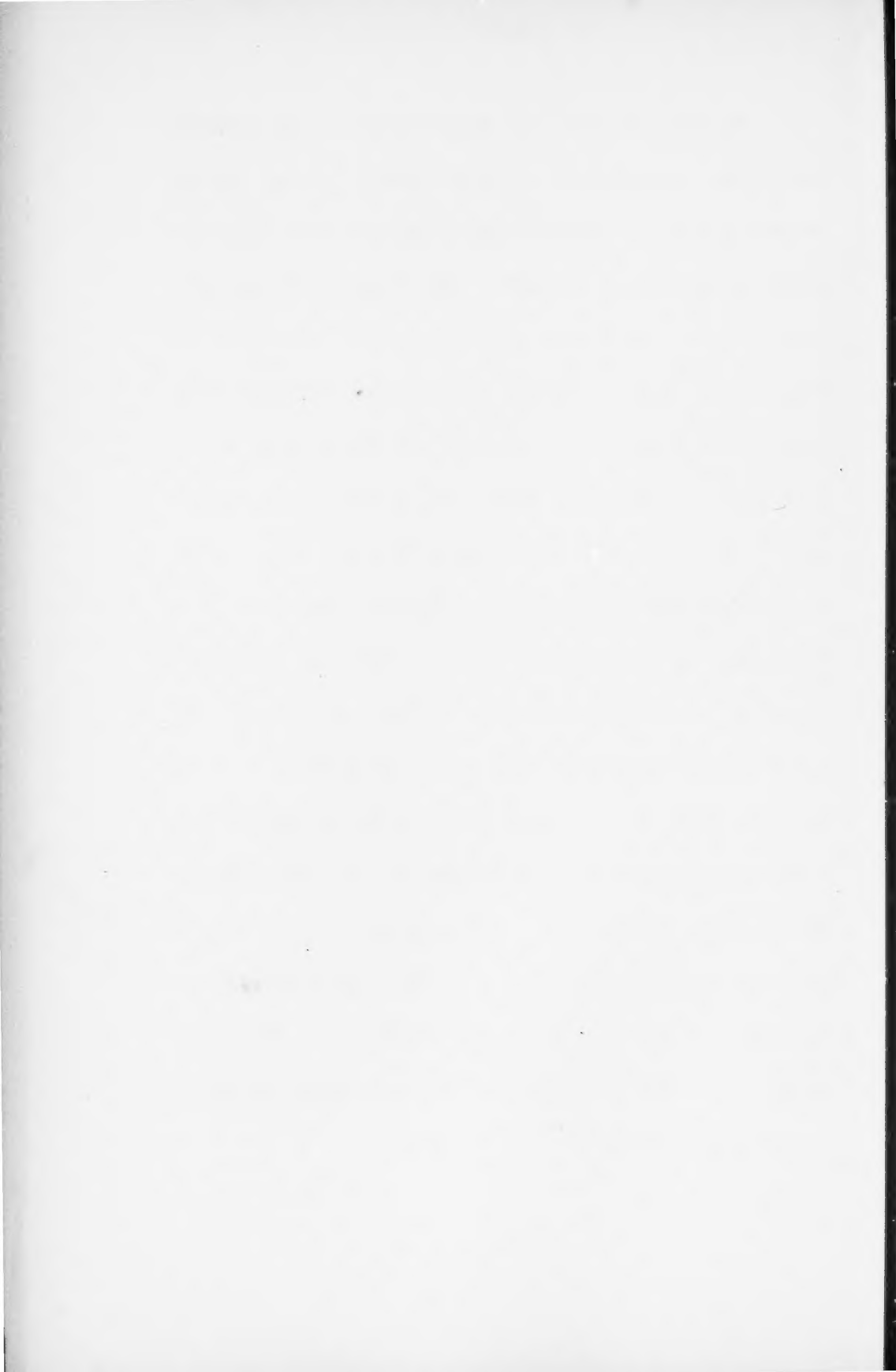


the Ninth Circuit is now in the mandatory position of reviewing the applicable provisions of the Code; viz, the innocent spouse rule, the community property provisions and the penalty sections.

The Honorable Court will be required to examine both the application of the general facts to the general provisions charged by the Government and the propriety of the specific provisions to this particular taxpayer under the particular circumstances of this case.

Such an examination cannot be undertaken without a constitutional frame of reference. Indeed, a due process/equal protection context engulfs in the entire discussion, as Appellant has made obvious in the questions she's presented and in the case authorities she's cited, together with code sections, rules and histories of legislative enactments.

At the heart of Appellant's argument is the question of fairness -- a word which is reiterated throughout the Appellant's opening brief. At stake, however, are not just the Appellant's right to fairness and equal treatment under the law, but the institution of marriage as a tax-paying entity and the disparate filing statuses now permitted by the Internal Revenue Code. These matters are already in issue by virtue of the Appellant's initial brief. They will be an essential subject for oral argument. To block the Appellant now from presenting the appropriate supplemental brief prejudicially deprives the Appellant of a procedural right while limiting the knowledge of both the Court and the government on the issues which are now or will soon hereafter be at stake.



There is no evidence that the Internal Revenue Service will be prejudiced by the Supplemental Brief. After all, the Appellant's opening brief was filed on July 19, 1986. The Motion for Leave to file the supplemental brief was filed approximately one month later. The responsive brief by the IRS did not address either the fairness/due process questions raised in the original brief or the more detailed constitutional explanations offered in the Supplemental Brief. However, the IRS' Brief for the Appellee does not purport to address the Supplemental Brief, and there is no reason why the agency should not now be permitted to answer the Supplemental Brief.

Rule 28(j) provides for supplementing briefs with pertinent authorities. It does not conceive of a mere list of additional cases. Rather, Rule 28(j) is



designed to allow pertinent authorities to be appended onto the original brief with appropriate explanation.

It is well-established that where counsel makes no attempt to address an issue -- especially of far-reaching significance such as this one -- the appellate courts will not remedy the defect. Carducci v. Regan, 714 F.2d 171 (1983). Obviously, Appellant herein is making an ample attempt to address the constitutional issues at stake. To bar the Supplemental Brief allows the IRS to dictate the non-constitutional approach to this Appeal which it has already evidenced by the nature of its Brief for the Appellee.

Moreover, this matter raises an urgent question of public and private importance, touching the very heart of



the institution of marriage and challenging the current method of apportioning the tax burden among married individuals based upon filing status. Clearly, such an issue affects a broad public concern. This court must properly balance the considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decision-making. Consumers Union of United States Inc. v. Federal Power Commission, 510 F.2d 656 (1974).

Even if Rose Sanders were one month late in making, or in developing, her constitutional arguments herein, this Court should excuse the minor lateness and reconsider the petition for leave to file the brief. The issues are extraordinary and they warrant extraordinary examination.

Needless to say, the urgency and utter importance of this component of the



Appellant's case rises above all other procedural considerations at the moment. Thus, this Court should not proceed with this matter until the Petition at bar can be properly reconsidered.

In view of the foregoing arguments, and in light of the previous extensive briefs presented on this subject, Appellant-Petitioner hereby respectfully requests this Honorable Court to reconsider the Petition of August 22, 1986 for leave to file a Supplemental Brief, and to grant said leave now with an appropriate period in which Appellee might respond thereto.

Respectfully submitted,

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In the
UNITED STATES COURT OF APPEALS
For the Ninth Circuit

No. 86 - 7236

ROSE SANDERS,

Appellant

v.

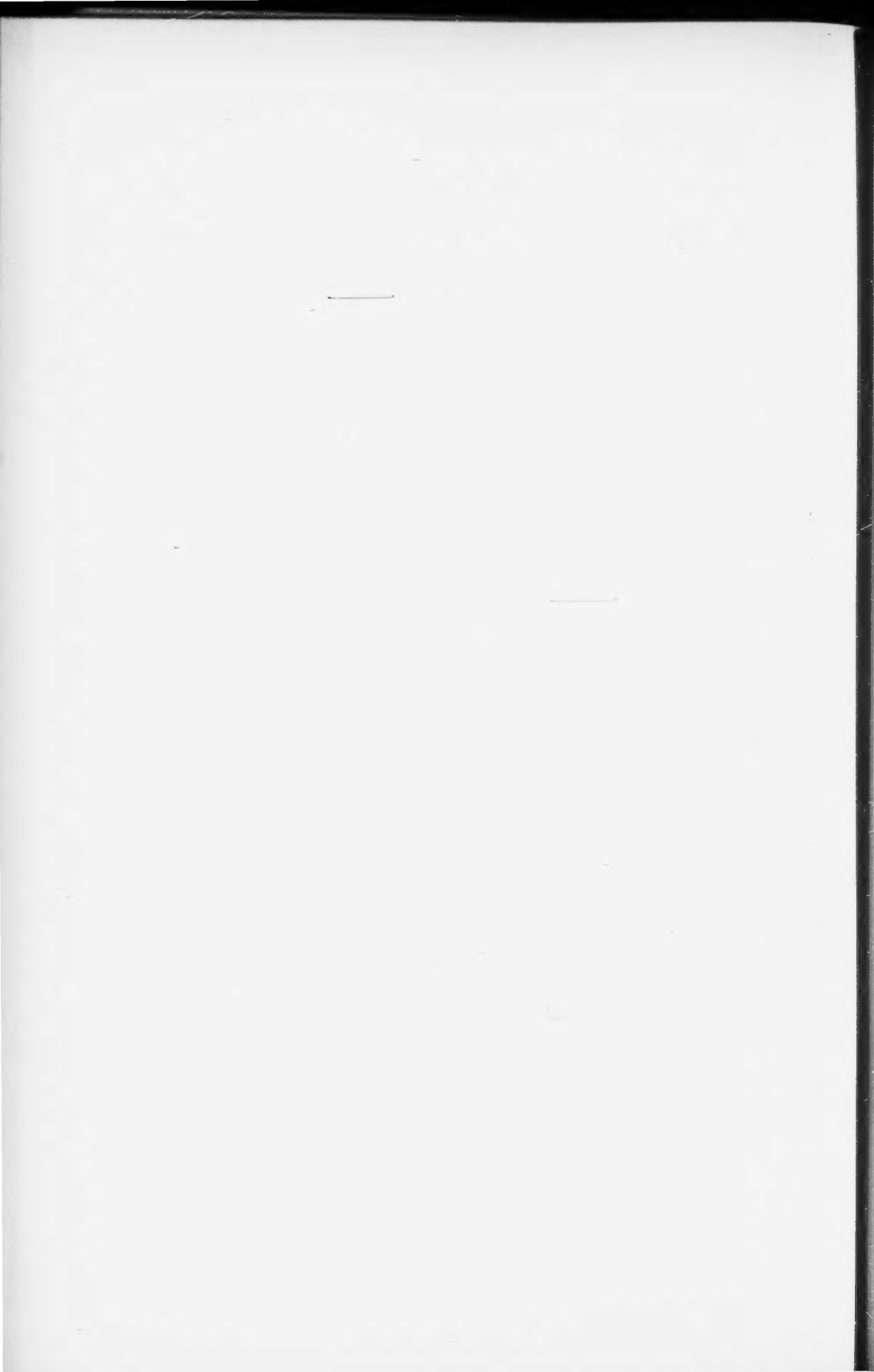
COMMISSIONER OF INTERNAL REVENUE,

Appellee

Appeal from Order of the United States
Tax Court, finding for Responding-
Appellee and holding valid tax
deficiencies and additions.

SUPPLEMENTAL BRIEF FOR APPELLANT

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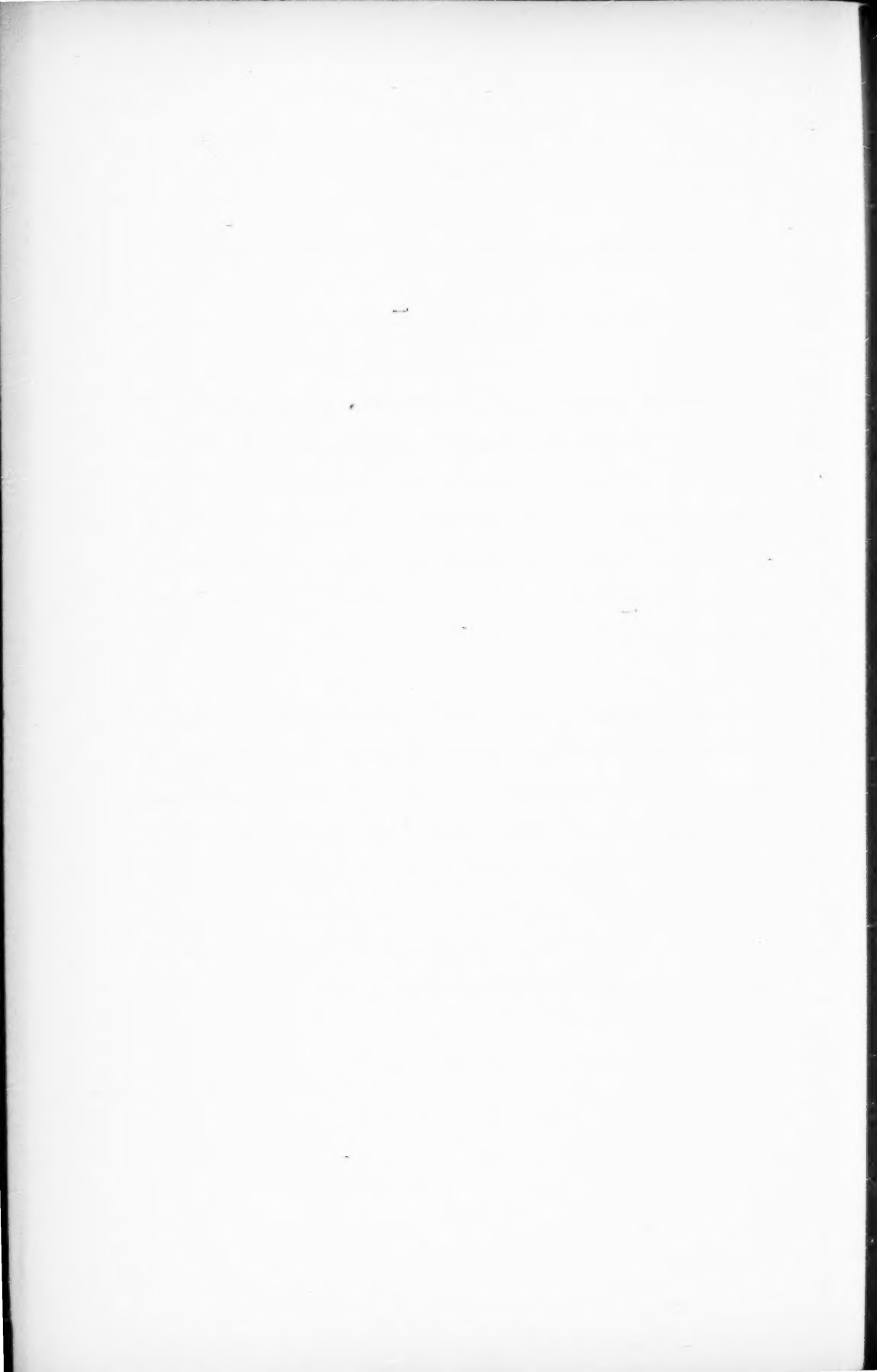
SUPPLEMENTAL BRIEF OF APPELLANT

GENERALLY

This brief is filed as a supplement to the original Appellant's Brief filed with this Court. This brief specifically presents constitutional grounds for reversing the deficiency determination of the United States Tax Court.

Although it is presented under separate cover, this brief is intended to be read in simultaneous contemplation of, and in pari materia with, the first brief.

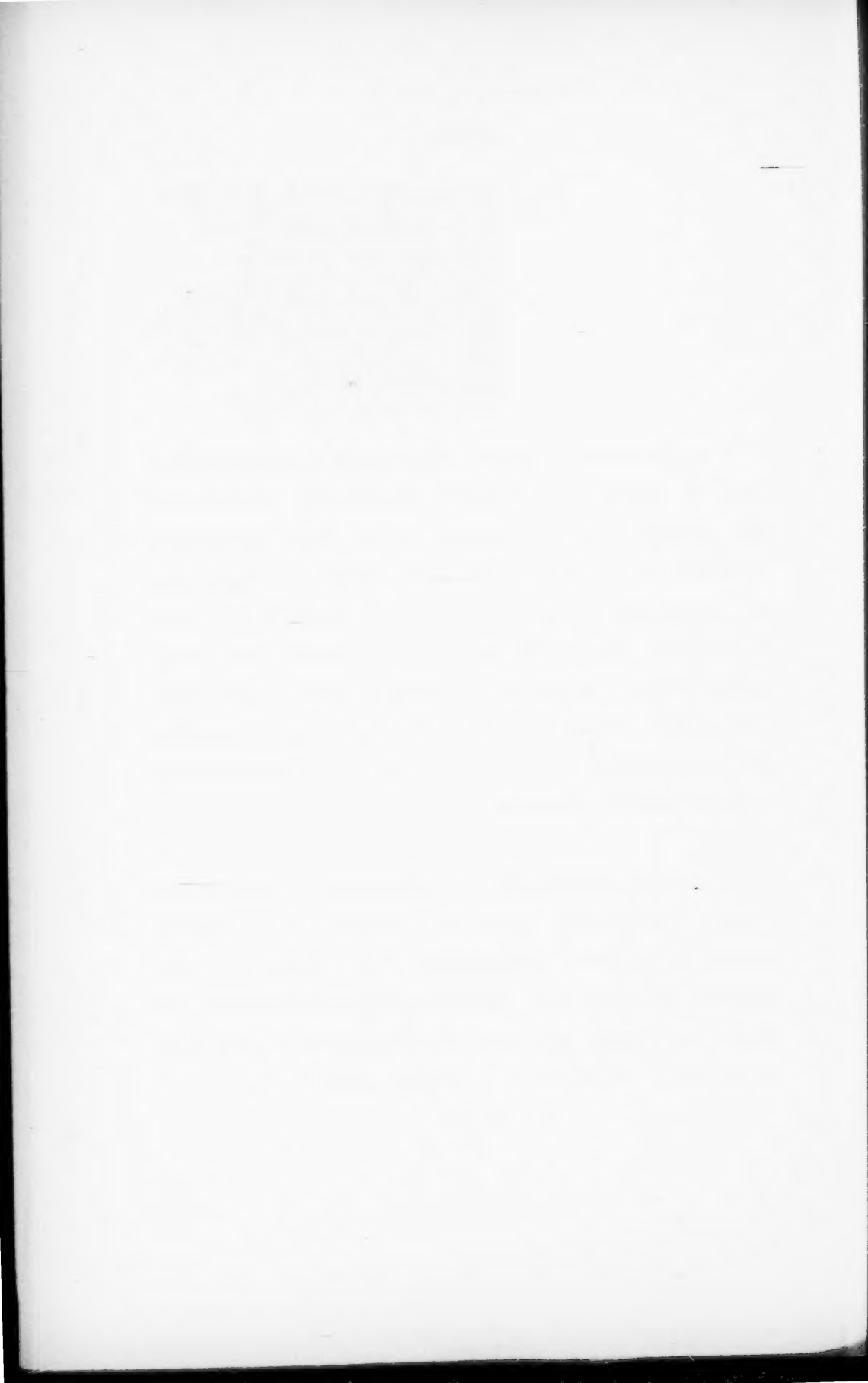
As such, the Statement of the Case is not reiterated herein.



I. APPELLANT ROSE SANDERS
HAS BEEN DEPRIVED OF
HER CONSTITUTIONAL
"PROPERTY" RIGHTS
INsofar AS SHE LACKED
THE REQUISITE KNOWLEDGE
AND RESPONSIBILITY FOR
HER HUSBAND'S
UNDISCLOSED INCOME

Appellant Rose Sanders undeniably has a constitutional property interest at stake here under the due process clause of the Fifth Amendment. Mathews v. Eldridge, 424 U.S. 319 (1976). The Internal Revenue Service seeks to levy penalties against her and collect revenue from her which is wholly attributable to her husband's undisclosed income.

Mrs. Sanders certainly concedes that Congress had a right to enact revenue laws designed to combat the rapid growth of deliberate defiance of the tax laws by tax protesters like her husband. However, it was never the



intent of Congress that its laws would operate in a community property jurisdiction to rob an innocent wife of her fundamental right of due process. U.S. Const. Amend. V.

The government is unable to show a compelling interest which is great enough to outweigh Mrs. Sanders' due process right here. After all, she filed her tax return on a timely basis. She paid her taxes. She reported all of the income she knew about. And she did more than is required by the law to ascertain from her evasive husband how much he earned and from what sources.

What has happened to her is an impermissible encroachment.

Due process violations cannot be tolerated, even if committed by the



Internal Revenue Service in what appears to be a proper enforcement activity. See, e.g., Todd v. United States, 85-2 USTC par. 9560 (1985).

If the Tax Court believes that the Government is vested with adequate statutory authority to penalize the Appellant for the unstoppable acts of another, it essentially has ruled in a manner that pits the Sixteenth Amendment taxing power against the Fifth Amendment due process clause. Such a dilemma is unnecessary.

The United States Supreme Court has already ruled that the Sixteenth Amendment does not repeal the Fifth Amendment provisions governing self-incrimination. Murdock v. United States, 62 F.2d 929, aff'd 290 U.S. 389, 54 S.Ct. 223 (1932). There is no reason to believe that the Sixteenth Amendment now repeals or supersedes any



other provision of the Fifth Amendment.

It is also clear that Congress has acted to relive the innocent spouse from the tax liability and fraud penalty when the couple files a joint return. IRC Sect. 6013(e), added by Sect. 1 of Pub. Law. 91-679, 91st Cong., 2nd Sess., approved Jan. 12, 1971. The government's interest in collecting unnpaid taxes and assessing fraud penalties are not so compelling as to distinguish between those innocent spouses who file joint returns and those who do not.

Appellant Rose Sanders did not file a joint return, and yet her status is precisely the kind of innocent disposition that Congress sought to protect. Unless this court cloaks Mrs. Sanders with the protection she deserves, she will suffer an unconstitutional deprivation of her

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substantive right of due process. She simply and wholeheartedly should not lose the benefit of the Fifth Amendment because she married a man who later turned out to be a tax dodger and over whom she had no control.



II. APPELLANT HAS BEEN
DEPRIVED OF HER RIGHT TO
EQUAL PROTECTION OF THE
LAWS

A. ENFORCEMENT OF IRC SECTION
6013(e) IMPERMISSIBLY
ESTABLISHES A DICHOTOMOUS
TREATMENT OF DIFFERENT CLASSES
OF TAX FILERS

Because Section 6013(e) confers innocent spouse status only upon those who file a joint return, it impermissibly establishes two classes of tax filers (joint and separate) and treats them unequally.

Indeed, the Appellant herein filed separately, and arguably by that act alone, precluded herself from technical eligibility for innocent spouse status under Section 6013(e).

Even if the government had some justification for requiring joint returns as a condition for innocent



spouse protection, it could not logically refuse to apply the law to somebody who filed separately while married and while living in a community property state. The double disposition of being married and being invested with community property status intrinsically locks husband and wife in a legal bond which cannot be broken by merely filing separate returns. By affording protection to those who file jointly while denying it to those who file separately, the government unconstitutionally penalizes a spouse who takes advantage of another legal right (i.e. the right to choose filing status).

Obviously, the joint return provision of Section 6013 was included with a significant degree of arbitrariness and capriciousness. The classification it prefers inherently violates the equal protection guarantee

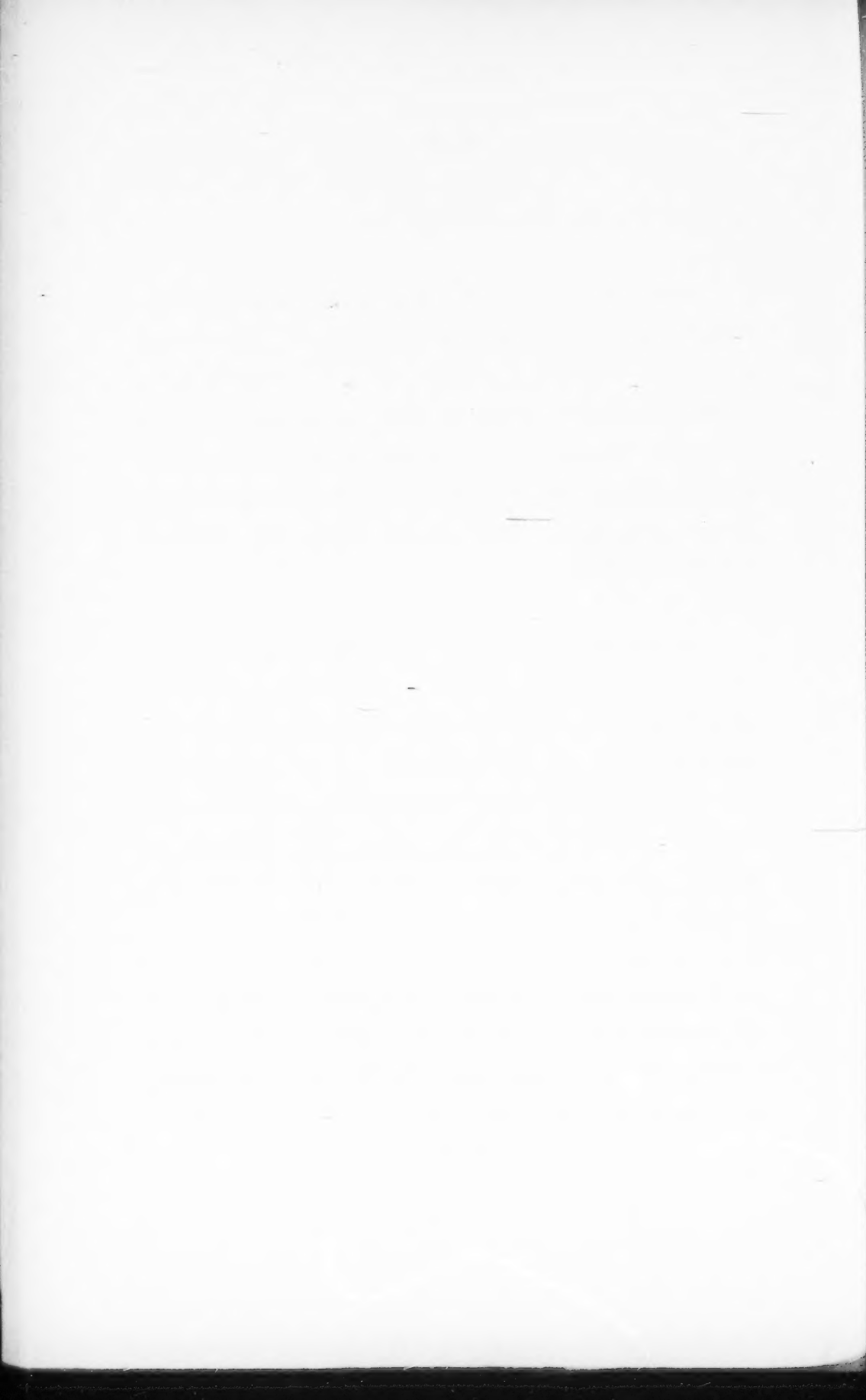


of the Fifth amendment.

Our federal courts have said that equal protection is violated whenever an insufficient legitimate justification exists for distinguishing between groups of taxpayers. Taxation with Representation of Washington v. Regan et al., 676 F.2d 715, 49 AFTR2d 82-961 (1982).

Moreover, the Supreme Court of California has cited the Fourteenth Amendment as grounds for prohibiting unequal treatment between classifications of taxpayers on a state level. See Irwin v. City of Manhattan Beach, 51 Cal. Rptr. 881, 415 P.2d 769 (1966).

Appellant Rose Sanders filed a separate tax return but did not technically separate from her husband or the state of marriage. Her mere act



of filing separately should not be judged sufficient to relegate her to an inferior classification of spouses who don't receive the benefit of the equal protection of the laws.



B. THE EXCLUSION OF APPELLANT FROM
INNOCENT SPOUSE PROTECTION
AMOUNTS TO A GENDER
CLASSIFICATION WHICH PREJUDICES
TH CONSTITUTIONAL RIGHTS OF
UNKNOWN WIVES

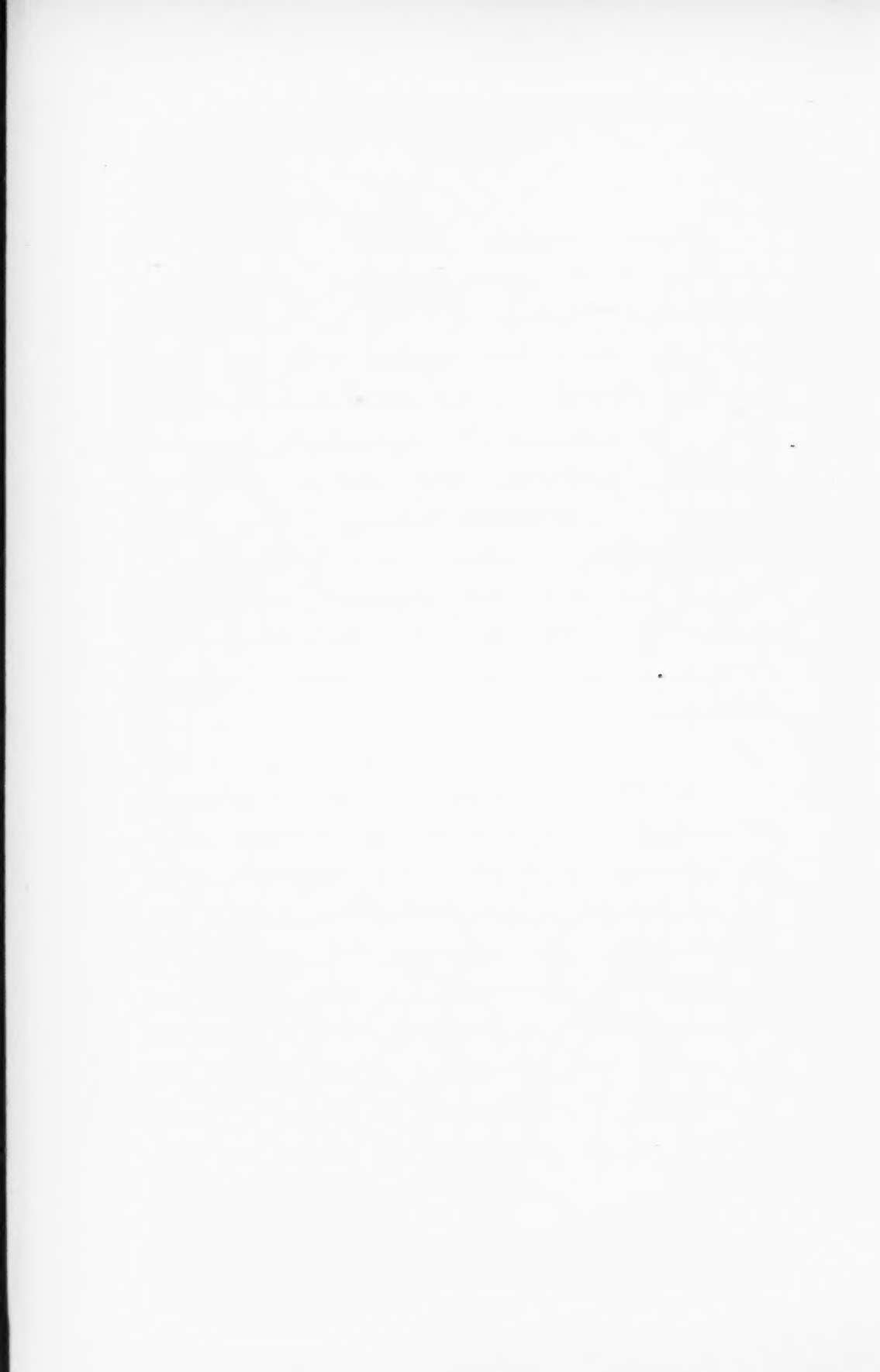
Although Section 6013 apparently did not seek to discriminate against women, it represents a de facto form of sex discrimination against married women. Scores of demographic data, backed up by common experience and common sense, indicate that men are the main wage earners in the overwhelming majority of American families. In any cases, they are the only wage earners.

As such, Section 6013 -- for all of its earnest intentions -- amounts to a statutory device for some women to be insulated from the tax evasions caused by their husbands. Other women, like the Appellant herein, are not technically within the statutory definition and are thus not insulated.



Those "other women" lose the benefit of an equal and fair system of taxation. Since it is predominantly men who earn the wages and pay the marital taxes, it is predominantly men who, in community property states, inflict hardship upon their innocent wives. Consequently, it is predominantly women -- the "other women" -- who are saddled with the community tax burden and are not entitled to the innocent spouse defense.

Certainly some tax matters naturally or accidentally divide upon sex-related grounds. For example, the use of gender-based mortality tables in computation of estates of decedents dying before December 1, 1983 does not violate equal protection because under the Fifth Amendment due process clause, the gender classification substantially relates to an important governmental



objective. Manufacturers Hanover Trust Company v. United States, 85-2 USTC par. 13,640 (1985).

This case is markedly different. First, the Code section in question is not gender-based, but rather through social circumstance, it adversely affects women more than men. Secondly, the adverse effect is not somehow outweighed by some important governmental objective -- that is, some important reason for not giving all unknowing women the benefit of the innocent spouse provision. Therefore, Section 6013 should be invalidated. If it stands, it must be modified to apply to the Appellant and other such women who are innocent spouses, despite their separate filing status.

Yet another difficulty emerges in the facts of this matter. By denying



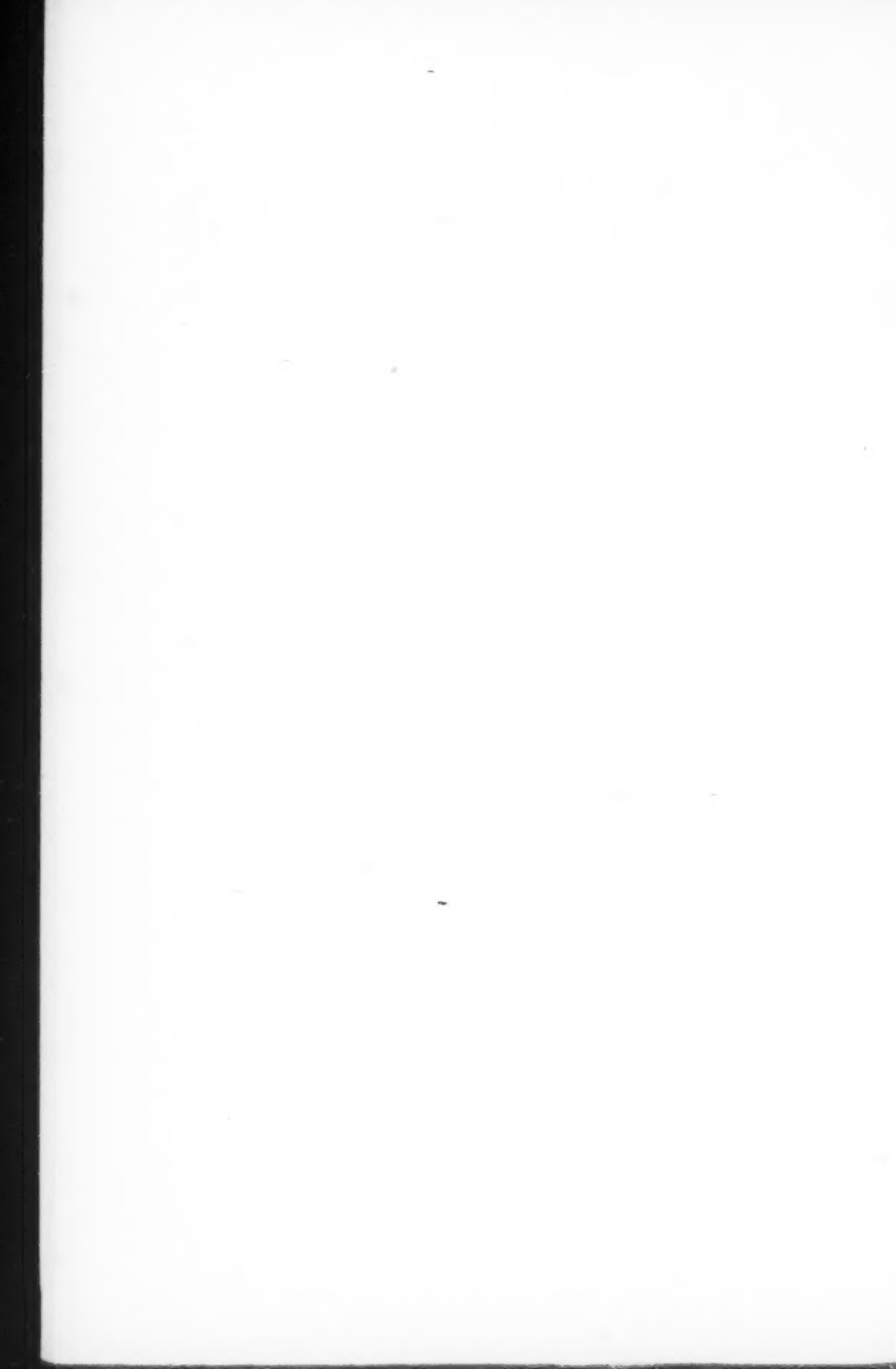
the Appellant the benefit of innocent spouse status, the Code actually makes a distinction based upon the condition of her marriage. To wit, it is a product of her marital state of affairs that Appellant chose to file separately. Communication, cooperation and coordination with her husband had become a virtual impossibility, making it an exercise in futility to have filed taxes jointly. Hence, the same condition that made her unable to file jointly ultimately deprived her of protection from penalties for having the condition and not filing separately. Such distinctions based on such things are not specifically alluded to in the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq., but Title VII does specifically prohibit sex discrimination.



C. EXCLUDING THE APPELLANT FROM
INNOCENT SPOUSE STATUS IS
FUNDAMENTALLY UNFAIR AND
ULTIMATELY CONTRADICTORY TO THE
POLICY OF MANY OTHER FEDERAL
STATUTORY LAWS

The heart of the equal protection provision is that the laws of the land are applied equally for the benefit and for the protection of everybody. Yet a strict construction of Section 6013 instantly gives birth to an inequality.

For several decades now, Congress has voted for laws designed to overcome the depressing economic and social consequences of discriminating against women. These include acts designed to equalize the rights of female students, female employees, female consumers and wives. For example, the Equal Pay Act of 1963 prohibits wage discrimination as a failure to treat all equally under substantially similar conditions (emphasis added). Assuming the



Internal Revenue Code does not supersede the equal protection clause, is not its objective to treat equally all taxpayers who are subjected to substantially similar condition? One would think that the analogy is valid in trying to maintain a uniform philosophy in the United States Code.

Certainly, variances or unequal treatment of employees under company pension or retirement plans have been held illegal under 42 U.S.C. 2000e-2(1). Procedures which turn out to favor one sex over another have been invalidated under the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Equal Employment Opportunity Act of 1972.

Does it make sense that our Appellant would find more comfort and justice in the workplace, where she is guaranteed equality, than at home,

where she has been essentially dubbed a non-innocent spouse?

The answer must be in the negative. Under the present circumstances, the treatment of Appellant is unfair, unconstitutional and unacceptable contradictory to the spirit and approach of federal code law.



D. THE OPERATION OF SECTION
6013 CREATES AN
UNCONSTITUTIONAL
CLASSIFICATION OF IGNORANT
SPOUSES WHO, DESPITE THEIR
LACK OF KNOWLEDGE, ARE NOT
AFFORDED SPOUSE PROTECTION

The idea of innocent spouse status is that the government will not seek a penalty against a spouse who had no knowledge of her husband's undisclosed income and thus failed to report it. Unfortunately, Section 6013 only technically confers innocent spouse status upon those women smart enough or lucky enough to file jointly. Those who file separately, as in the case of this Appellant, are -- for all intents and purposes -- ignorant spouses.

The distinction between innocent spouse and ignorant spouse is a bad one. Ultimately, the legitimate objective of the government is to protect those spouses who didn't know



that their husbands were hiding money from the Internal Revenue Service. Ignorant spouses possess the same requisite lack of knowledge about their tax-evading husbands as do innocent spouses. Thus, the principles of fairness and equal protection strongly suggest that ignorant spouses and innocent spouses should be treated identically. By not according Section 6013 protection to even women who don't know about their spouses' tax secrets, the courts will permit an unfortunate classification of ignorant wives to survive against another classification of legal minded wives who think of themselves as innocent.

Filing status should be irrelevant. All spouses of tax evaders in community property states should be treated equally. Their burden should be to prove that they lacked knowledge of their spouse's unreported earnings.

As one state court put it, equality in taxation is accomplished when the burden of the tax falls equally and impartially on all the persons and property subject to it, so that no higher rate or greater levy in proportion to value is imposed on one person or species of property than on another similiary situated or of like character. State ex rel. Haggart v. Nichols, 66 N.D. 355, 265 N.W. 859.

The words are unassailable, and they truly underscore the rule that applies here.



III. IRC SECTION 6013
APPLIES WHERE THE
LIABILITY OF THE
SPOUSE WOULD BE
INEQUITABLE

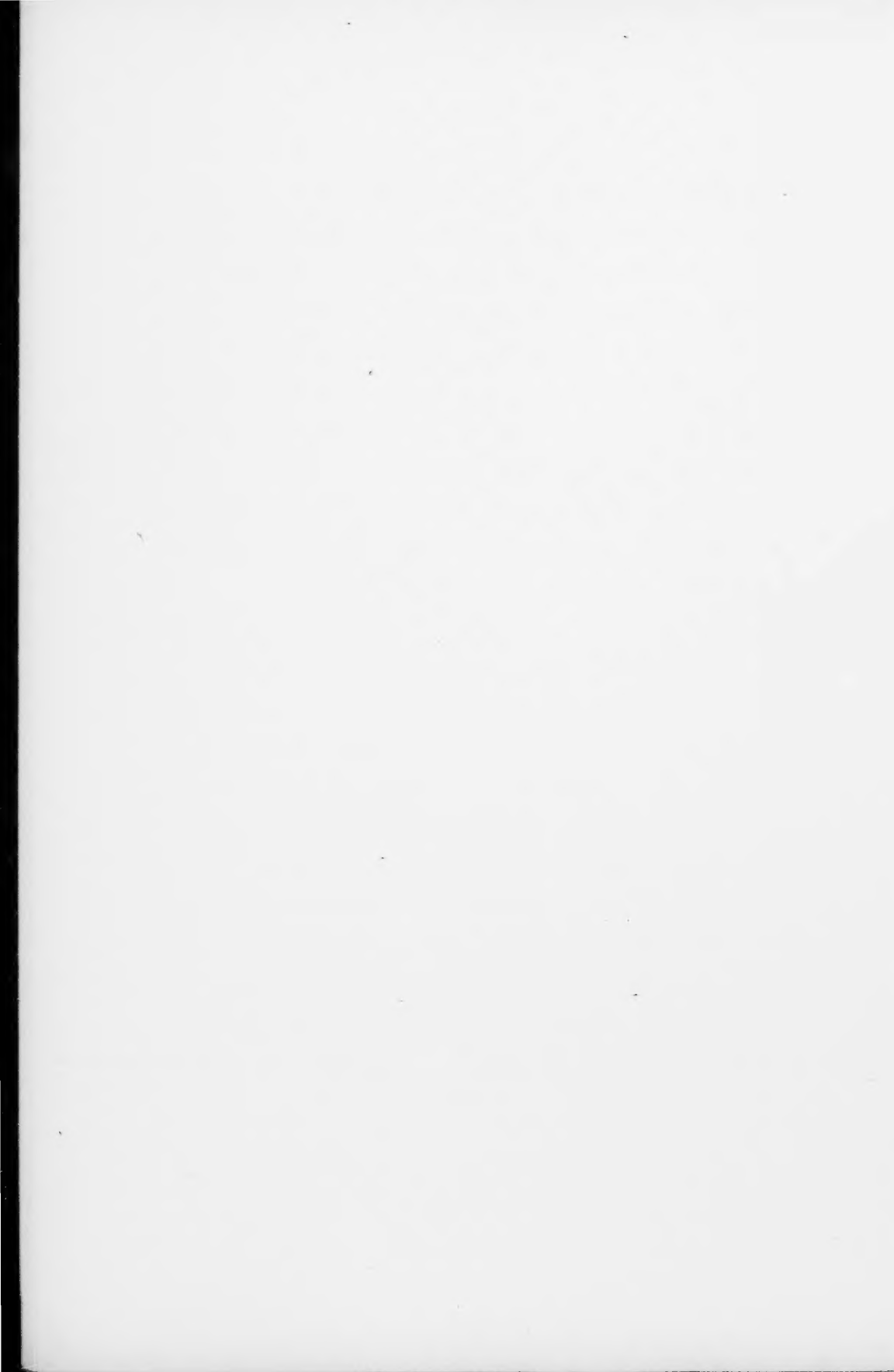
One of the requirements of the innocent spouse rule is that it would "inequitable" to hold a wife liable for her share of the tax deficiency caused by her husband. 26 U.S.C. 6013 (e) (1) (C). This condition requires a determination of whether, taking into account all the facts and circumstances, it is inequitable to hold a spouse liable for somebody else's conduct. Treas. Reg. 1.6013-5(b). Schmidt v. United States, 84-1 USTC par. 9333 (1984).

Quite clearly, the Code provision and the Regulation seek to achieve equity, It would thus be antithetical to deprive Appellant herein of protection under the law, despite her filing status.



One factor to consider is whether she significantly benefitted, directly or indirectly, from the items omitted from gross income. Treas. Reg. 1.6013-5. Schmidt, supra. The lower court record is devoid of any proof that the Appellant profited. Normal support is not considered a significant benefit, and there are no transfers of property traceable to the omitted income. Treas. Reg. 1.6013-5.

Essentially, equity is given a preferential position in these matters. Indeed, the United States Court of Appeals for the 5th, 7th and 10th Circuits has asserted that even where a District Court correctly found a significant benefit, innocent-spouse relief would still be available if it would nevertheless be inequitable to hold the wife liable for the unpaid taxes. Busse v. United States, 76-2

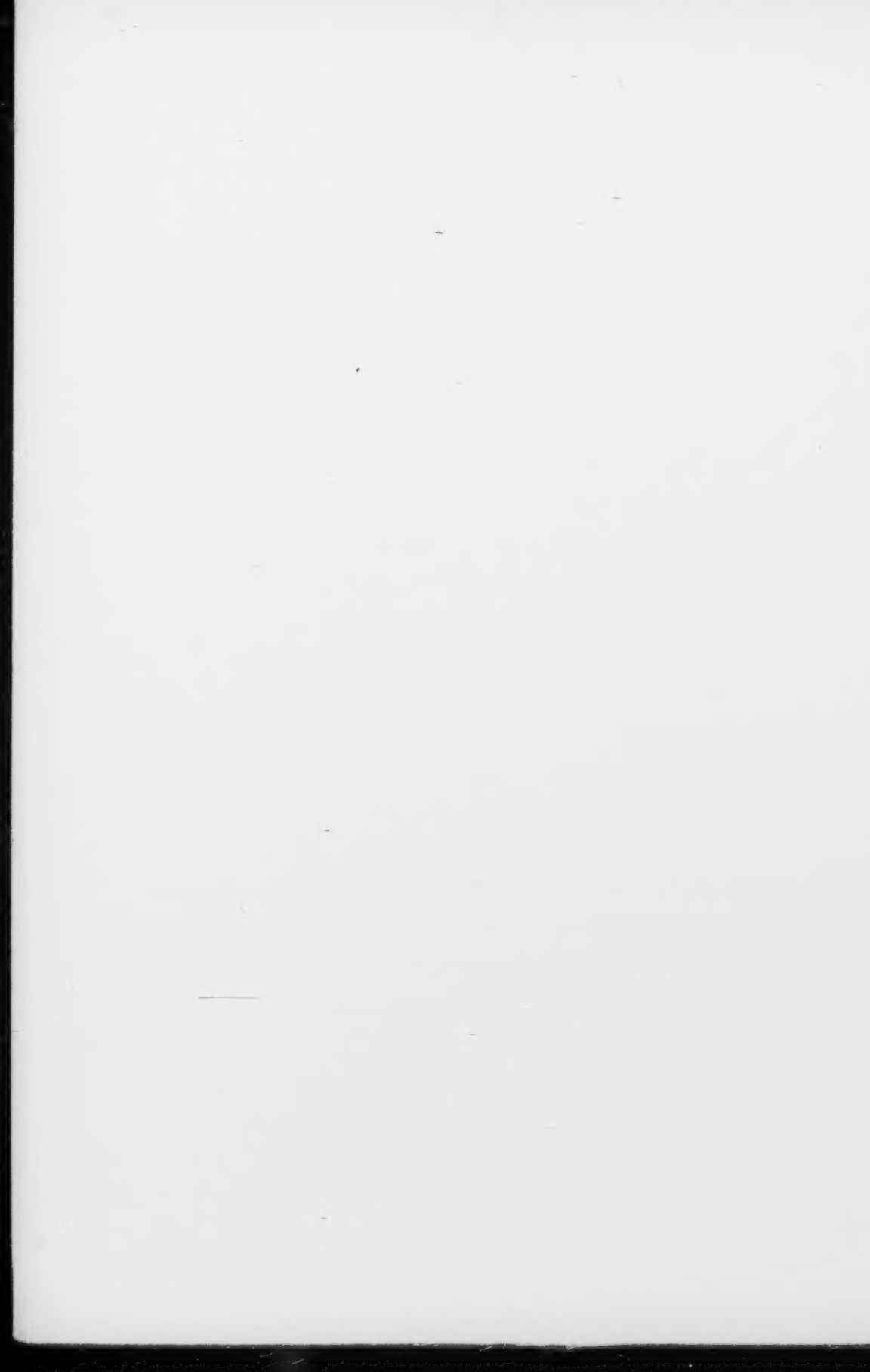


USTC par. 9676 (7th Cir. 1976); Sanders v. United States, 509 F.2d 162, 170, 171n. 6 (5th Cir. 1975); Dakil v. United States, 496 F.2d 431, 433 (10th Cir. 1974).

The inequitability provision was obviously included to reflect a federal attitude and philosophy toward the application of innocent spouse relief.

Any benefit found must be considered in the totality of the circumstances. Busse, supra. In the case of the present Appellant, two blatant considerations instantly surface: Rose Sanders derived no benefit from her husband's disobedience of tax laws, and she lacked the knowledge and wherewithal to stop her husband's noncompliant conduct.

That's exactly the kind of taxpayer Congress sought to protect by the



inequitability provision of Section 6013. In the words of the Tenth Circuit, "(e)ven a tax collector should have some heart." Dakil, supra, 496 F.2d at 433.



IV. THE GOVERNMENT'S
CURRENT APPLICATION
UNDERMINES THE
RELATION OF MARRIAGE
AND CONSEQUENTLY POSES
A PRIVACY THREAT

Appellant Rose Sanders obviously did not have the best of possible marriages. In fact, it is fair to say that relations with her husband were considerably weakened during the period when he secreted income from the Internal Revenue Service.

Unfortunately, it seems, Appellant cherished the institution of marriage and chose, at that time, not to pursue a divorce. Had she been divorced prior to her husband's activities, the question of her liability would be instantly answerable and the issue of innocent spouse status would be moot.

But Appellant remained married -- and because of that she suffered the



misfortune of being inseparably linked by community property laws to a tax protester.

Such a predicament is both unfortunate and un-American.

Marriage, as distinguished from the agreement to marry and from the act of becoming married, is the civil status of a man and a women united in law for life, for the discharge to each other and the community of the duties legally incumbent upon their association. See, e.g., Collins v. Hoag & Rollins, 121 Neb. 716, 238 N.W. 351, 355.

It is a condition vested in love, aid, comfort and society, all of which constitute a public policy of facilitation and protecting marriage.



America favors marriages, It promotes them.

It would surely contradict that public policy if married individuals are forced to choose between remaining married or obtaining relief from the tax ramifications of living with a lawbreaking spouse.

But what else could Rose Sanders do? -Having already filed separately and thus technically qualifying under Section 6013, she had no choice but to get divorced to avoid future liability under the Code.

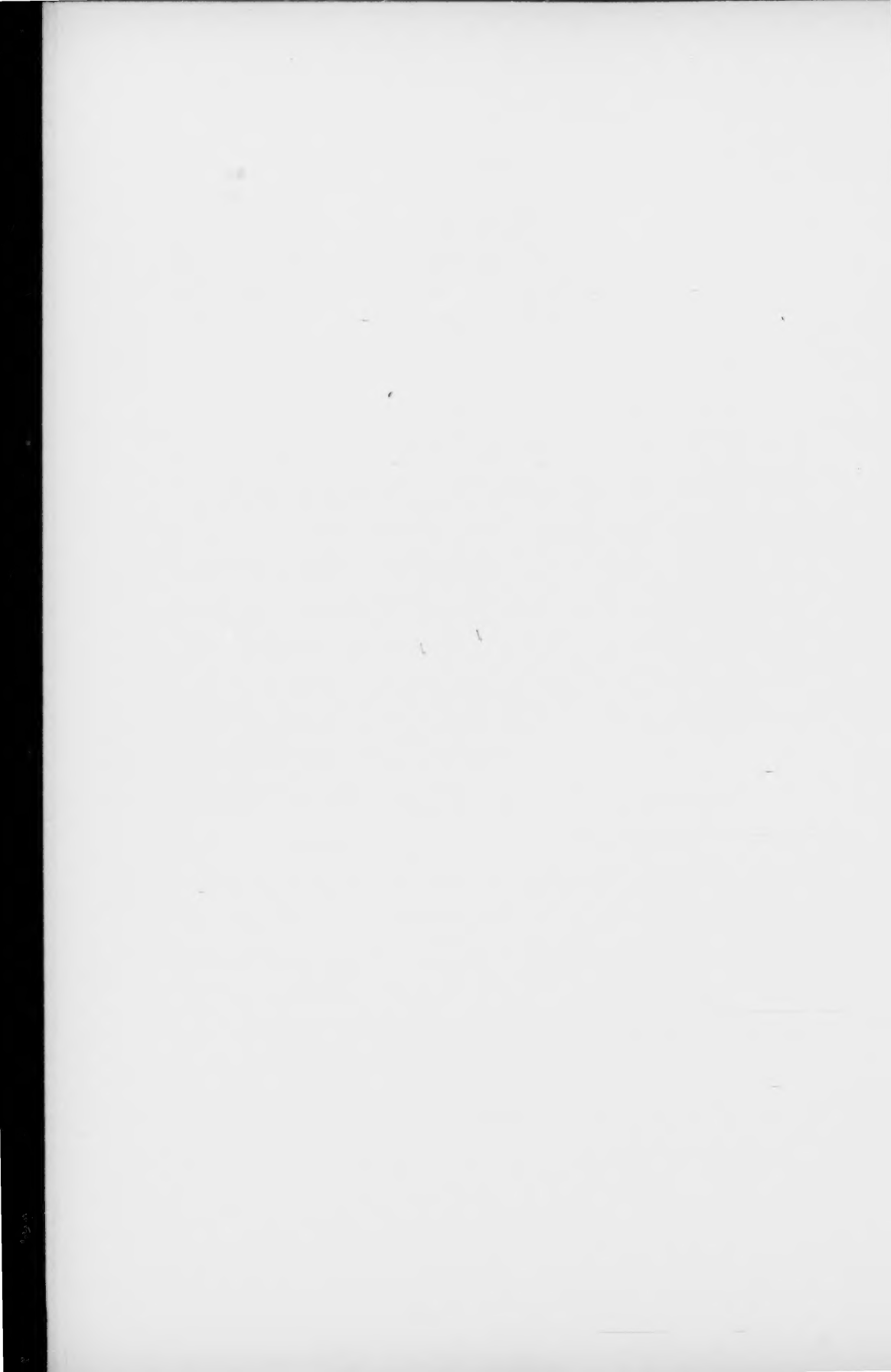
Such an interference with the marital right is inherently infringing. It immediately calls into consideration the Appellant's right of association under the First Amendment and her rights of privacy. U.S. Const. Amends. I, IX.



V. THE GALLIHER DECISION MUST
BE REVISITED; FOCUS SHOULD
BE ON DIFFERENCE IN STATUS
RATHER THAN COMMUNITY
PROPERTY LAWS

The United States courts should revisit and ultimately reverse the decision of Gallier v. Commissioner of Internal Revenue, 62 USTC 760 (1974). In that case, a taxpayer was deemed ineligible for innocent spouse relief because she filed a separate income tax return -- a fact situation akin to the present matter.

However, the Gallier court ruled that Section 6013(e) does not unconstitutionally discriminate against taxpayers in a community property state. The court said that Congress was cognizant of the effect of community property laws. 62 USTC at 762.



The case should nonetheless be revisited. Gallier failed to apply a crucial analysis: Did the government's decision to exclude those who file separately from innocent spouse relief amount to a compelling (or even a substantial) governmental justification for denying them the remedial intent of the legislation? Appellant herein does not ask this Court to reconsider the constitutional validity of community property laws, a matter which was long ago proved, Poe v. Seaborn, 282 U.S. 101, 117, 118 (1930), and which Gallier adequately addressed. 62 USTC at 763.

Rather, Appellant asks this Court to grant unto her relief in the nature of innocent spouse status because the minor statutory provision which precludes her perfect eligibility for



the status robs her of due process, unequally applies the law and unfairly employs the taxing power, is fundamentally inequitable and infinitely blocks the progress of marriage. Moreover, the government is without a compelling justification, or even a substantial interest to back it up. These are preeminent constitutional questions and cannot be settled by a re-examination of the risks and benefits of community property laws.

CONCLUSION

For all of the foregoing reasons, the overriding considerations of equity, fairness and public policy, and the various detailed arguments presented in the original brief by this Appellant, it is hereby respectfully asked that this Honorable Court quickly reverse the government's charges and claims against Rose Sanders and announce that those spouses not otherwise entitled to relief under 26 U.S.C. 6013 may qualify for relief under principles of equitability, due



process and equal protection as
provided by the Constitution of the
United States.

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IN THE SUPREME COURT OF THE UNITED STATES

ROSE SANDERS,	:	Docket No.
Petitioner	:	
	:	
	:	
v.	:	
	:	
COMMISSIONER OF	:	
INTERNAL REVENUE,	:	
	:	
Respondent	:	

CERTIFICATE OF SERVICE

The undersigned, counsel for the Petitioner in the above-captioned case hereby certifies that three copies of the Petition for Writ of Certiorari were served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by depositing same in the United States Post Office at World Way Center, Los Angeles, California, with First Class Postage prepaid this 24th day of June 1987.

Joyce Rebhun

JOYCE REBHUN
Counsel for Petitioner